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REPORTS  
OF  
CASES IN LAW AND EQUITY,  
DETERMINED IN THE  
SUPREME COURT  
OF THE  
STATE OF IOWA.

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By JOHN S. RUNNELLS,  
REPORTER.

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VOL. XI.  
BEING VOL. XLVIII OF THE SERIES.

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REPORTER.

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REPORTS  
OF  
*Cases in Law and Equity*  
DETERMINED IN THE  
SUPREME COURT  
OF  
THE STATE OF IOWA:  
DES MOINES, JUNE TERM, A. D. 1878.

IN THE THIRTY-SECOND YEAR OF THE STATE.

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PRESENT:

HON. JAMES H. ROTHROCK, CHIEF JUSTICE.  
" JOSEPH M. BECK,  
" AUSTIN ADAMS, } JUDGES.  
" WILLIAM H. SEEVERS,  
" JAMES G. DAY,

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48	11
104	322

THE KEOKUK & DES MOINES RAILWAY CO. V. LINDLEY ET AL.

1. **Tax Title: POSSESSION: LICENSEE CANNOT ACQUIRE.** The licensee of real estate cannot acquire a tax title thereto as against his licensor, whose right of possession has continued for more than five years after the execution of the tax deed.
2. ———: ———: **STATUTE OF LIMITATIONS.** The right to recover possession under a tax deed is barred in five years after the execution thereof.



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The Keokuk & Des Moines Railway Co. v. Lindley.

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3. ———: DEFECT IN TITLE: POSSESSION. Even though there be defects in the title of the patent holder, he is nevertheless entitled to possession as against one claiming under a void tax title, when his possession is founded upon claim and color of title.

*Appeal from Jasper District Court.*

FRIDAY, MARCH 22.

ACTION in chancery to set aside a tax deed, and to quiet title to real property, the possession of which plaintiff held under a claim of title. By a cross-petition, defendants set up title under a tax sale and deed to the property, and prayed that their title be quieted. The relief sought by plaintiff was granted, and defendants' cross-petition was dismissed. Defendants appeal.

*R. A. Sankey*, for appellants.

*Smith & Wilson*, for appellee.

BECK, J.—I. The facts of the case, so far as they are necessary to be considered in determining the rights of the parties, are established by the testimony before us to be as follows: The Des Moines Valley Railroad Company, in 1865, purchased the property in question, two lots in the town of Monroe, and, under the title thus acquired, then entered into possession. The plaintiff claims all the property of the Des Moines Valley Railway Company, under a sale and deed executed, upon the foreclosure of a mortgage, to its grantors. They acquired this title, and took possession of the property, in 1874. After plaintiff acquired the property, defendants Lounsberry and Johnston entered upon the lots, under an agreement with plaintiff's superintendent, and built a barn thereon. The terms of agreement were, in effect, that they should pay no rent, and should not hold plaintiff liable for any loss or destruction of the buildings by fire, caused by the engines running upon the road. They were to surrender the

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The Keokuk & Des Moines Railway Co. v. Lindley.

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possession upon notice from plaintiff. The date of this agreement is not shown further than that it was in 1874. It does not clearly appear whether defendants held possession of all of the lots under this arrangement, though we think the testimony supports such a conclusion.

The lots were sold for taxes in October, 1866, and a treasurer's deed executed upon the sale, December 20, 1869, to defendant Lindley. On the 28th day of January, 1875, while Lounsberry and Johnston were in possession of the lots, as set out above, Lindley conveyed the property to these defendants, who now claim to hold it under the title then acquired. The relation, or tenancy, existing between defendants and plaintiff, was not terminated by notice, or otherwise, when defendants purchased the property of Lindley.

II. We conclude that the decree of the court below is well supported by the facts of the case, for the following reasons:

The defendants held the land under the plaintiff at the time they acquired the tax title. They insist, however, that they did not hold the land under a lease, but under a license, and, therefore, the relation of landlord and tenant did not exist between the parties. Let this be admitted. Their possession as licensees was the possession of the plaintiff. Such would be the case did a lease exist. It must be true in the case of a license, which is but a permission to use or occupy land for a specified purpose. Taylor's Landlord and Tenant, §§ 31, 86; Washburn on Real Property, p. 398. The possession of land held by a tenant or licensee, in contemplation of law, is in the landlord or licensor. The plaintiff, whether defendants were lessees or licensees, must be regarded as not having parted with the possession of the lots.

Plaintiff had been more than five years in possession after the tax deed was executed, when defendants purchased the tax title. The right to recover thereon is barred in that time, and plaintiffs can set up the bar of

1. TAX TITLE:  
possession: li-  
censee cannot  
acquire.

2. —: —: —:  
statute of lim-  
itations.

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The Keokuk & Des Moines Railway Co. v. Lindley.

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the statute in this action. *Hintrager v. Hennessy*, 46 Iowa, 600; *Wallace v. Sexton & Son*, 44 Id. 257; *Patton v. Luther*, 47 Id. 236.

As has been remarked, defendants' relation as licensees, or lessees, had not been terminated when they acquired the tax title. Could that title, in their hands, defeat plaintiff's right to the lots? We conclude that it could not, for they could acquire no higher right than their grantor, and, as we have seen, his right to recover the property was barred by the statute of limitations. The possession which they held after they acquired the tax title can give them no right to recover, for the rights of the parties must be determined as they were at the time they acquired the title. Surely it cannot be claimed that their tax title received force and vitality from their subsequent act in terminating their relation as licensees.

III. It is claimed that plaintiff has failed to show, by the testimony, that it holds the legal title to the lots, there being defects in its chain of title. Let this also be admitted. As  
 2. ———: de- against defendants, its right is based upon its pos-  
 fect in title: session,  
 'possession. session, which was under claim and color of title.  
 This right was not, as we have shown, defeated by defendants' tax title. Plaintiff is in equity entitled to recover the possession of the land, and hold it as against defendants, who are setting up the tax title to protect their possession. Equity will restore plaintiff to its rights in the property, which can only be done by restoring the possession, and will declare the tax title void as against plaintiff. The relief granted by the decree of the District Court is authorized by the law.

This view of the case renders the consideration of other questions raised by counsel unnecessary.

**AFFIRMED.**

Caldwell v. Bridal.

## CALDWELL V. BRIDAL.

1. **Sale: CONTRACT FOR DISEASED STOCK: WHEN VOID UNDER STATUTE.**

Under Section 4055 of the Code, a contract for the sale of sheep, known by the seller to be affected with a contagious disease, cannot be enforced, even when the purchaser has knowledge of the diseased condition of the sheep at the time of the purchase; the object of the statute being to prevent traffic in diseased animals, for the protection not only of the purchaser, but of the public.

48	16
81	343
48	15
113	608

2. ———: ———: **KNOWLEDGE OF NATURE OF DISEASE.** If, however, the seller is not aware that the disease with which the sheep are affected is contagious, the statute will not apply, being limited by its terms to the sale of sheep known to be affected with a contagious disease.

3. ———: ———: **FRAUDULENT CONCEALMENT.** The fact that the seller kept the diseased portion of the flock separate from the remainder, and did not show them to the buyer, would not vitiate the sale if the latter obtained knowledge of the diseased condition of the sheep before completing the purchase.

*Appeal from Appanoose District Court.*

**FRIDAY, MARCH 22.**

THE plaintiff claims \$607.25, alleged to be due on a promissory note. The defendant, for answer, alleges that the note was executed for the purchase price of two hundred and seventy-six sheep; that after the defendant had concluded to buy plaintiff's flock of sheep the plaintiff, with intent to defraud defendant, turned into the flock about sixty diseased and scabby sheep, which before had been separated from the flock, and that at the time of the sale of said sheep they were infected and had a contagious disease, commonly known as the scab, and were, therefore, sold contrary to law.

The jury returned a general verdict for the plaintiff for the amount of the note and interest, and also returned the following special verdict:

1. Was the note in this case given for sheep sold by the plaintiff to defendant? Yes.

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Caldwell v. Bridal.

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2. At the time of the sale of said sheep, did the sheep have a contagious disease? Yes.

3. Did the plaintiff know that they were so diseased at the time of the sale to defendant? Yes.

4. How many of the sheep were diseased, if any, at the time of the sale? Thirty head.

5. Did defendant know, when he bought the sheep, that they were diseased with the scab, or any of them? Yes.

6. Did the plaintiff know, at the time he sold the sheep to defendant, that the disease called scab was a contagious disease? No.

The motion to set aside the verdict and grant a new trial was overruled, and judgment was entered upon the verdict. The defendant appeals.

*Vermillion, Haynes & Vermillion* and *Geo. D. Porter*, for appellant.

*J. C. Coad* and *Tannehill & Fee*, for appellee.

DAY, J.—I. Section 4055 of the Code is as follows: “If the owner of sheep, or any person having the same in charge, knowingly import or drive into this State sheep having any contagious disease; or turn out or suffer any sheep having any contagious disease, knowing the same to be so diseased, to run at large upon any common, highway or uninclosed lands; or sell or dispose of any sheep, knowing the same to be so diseased, he shall be deemed guilty of a misdemeanor, and shall be punished by fine in any sum not less than fifty dollars, nor more than one hundred dollars.”

The defendant asked the court to instruct the jury as follows: “If the jury find that the note (was) given in consideration for sheep, as claimed by the defendant, and that the sheep were affected with a disease known as scab, and that said disease is contagious, and you find further that the plaintiff knew said sheep were so diseased, then the selling of said

sheep was a violation of law on the part of plaintiff, and he cannot recover." The court refused to give this instruction as asked, and gave it with the following qualification: "That would be true if Bridal, the defendant, did not know that said sheep were diseased; but if Bridal knew the true condition of the sheep, and bought the same with such knowledge, and took and kept the same, he is liable in law to pay for them, and the plaintiff can recover on the note."

Other instructions asked by defendant, placing a like construction upon the statute, were qualified in a similar manner. In this action we think the court erred. The statute in question was intended, not for the protection of the individual purchaser only, but for the protection of the public. It was intended to arrest the spread of contagious diseases amongst sheep, by making it penal to traffic in sheep, knowing them to be affected with such disease. The public might be exposed to great loss from the removal of infected sheep along the highways, even when the sales are made to persons aware of such diseased condition. The statute suggests no qualification such as made by the court. It declares the selling or disposing of any sheep, knowing them to be affected with a contagious disease, to be a misdemeanor. The law will not, we think, lend its aid to the enforcement of such a contract, even when the purchaser has knowledge of the diseased condition of the sheep purchased. See *Dillon & Palmer v. Allen*, 46 Iowa, 299.

II. We think, however, that the modification of the instructions above referred to was error without prejudice. The jury returned the following special verdict:

2. At the time of the sale of said sheep, did the sheep have a contagious disease? Yes.

3. Did the plaintiff know that they were so diseased at the time of the sale to defendant? Yes.

5. Did defendant know when he bought the sheep that they were diseased with the scab, or any of them? Yes.

6. Did the plaintiff know at the time he sold the sheep to

defendant that the disease called scab was a contagious disease? No.

These answers must be so construed, if practicable, without doing violence to the language employed, as to harmonize and give effect and force to all of them. It is claimed that the third and sixth are in conflict. It cannot, however, be supposed that the jury intended in the third answer to say that plaintiff knew the sheep were affected with a contagious disease, and in the sixth to say that plaintiff did not know the disease, with which the sheep were affected, to be contagious. We think that the third answer, taken in connection with the others, means no more than that plaintiff knew that the sheep were affected with the disease which they had; that is, they were so diseased, affected with the scab. In the sixth answer the jury say the plaintiff did not know the disease called scab was a contagious disease. If the plaintiff did not know the sheep were affected with a contagious disease, he violated no statute in their sale. Knowledge of the existence of a contagious disease is an ingredient in the offense declared in section 4055. As the special verdict shows that plaintiff did not have such knowledge, the contract may be enforced whether defendant had such knowledge or not. It follows that the modification complained of could have worked the defendant no prejudice.

III. The defendant asked the court to instruct the jury as follows: "If the jury believe from the evidence that Caldwell, <sup>2. —: —: knowledge of nature of disease.</sup> when expecting Bridal to call and see the sheep <sup>3. —: —: fraudulent concealment.</sup> with a view of purchasing, did separate said sheep by placing twenty-five or thirty diseased sheep in a back field, and showed him (Bridal) the rest of the flock, and if afterwards the contract of purchase was made on what Bridal saw of the sheep, and if afterwards Caldwell turned said sheep all together, representing them to be the same that Bridal had seen and purchased, it would be a fraud on Bridal, and he is entitled to such a deduction from the amount of the note as would

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Simonson v. The C., R. I. & P. R. Co.

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make Bridal whole by reason of such fraud practiced by Caldwell on Bridal."

The refusal to give this instruction is assigned as error. The abstract purports to set forth only a part of the testimony. The evidence set forth in the abstract showed that the sheep were all together, and were seen by defendant at the time the purchase was completed and the note in question was executed. The special findings also show that the defendant knew when he bought the sheep that they were diseased with the scab. As the defendant completed the purchase with knowledge of the diseased condition of the sheep, he was not damaged by the fact that when he first looked at the flock twenty-five or thirty diseased sheep were not with the flock. The foregoing considerations dispose of the alleged error in the instruction given by the court, and of the failure of the court to instruct more specifically upon the defense of fraud in the sale.

The record discloses no prejudicial error.

AFFIRMED.

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SIMONSON v. THE C., R. I. & P. R. Co.

1. **Practice in the Supreme Court : APPEAL.** The supreme court has no general original jurisdiction, and cannot order that an appellee shall proceed no further with a cause. An appellant who deems that the appellee has, pending the appeal, deprived himself of his rights thereunder, has the alternative of dismissal of his appeal, or of a final submission upon the merits thereof.

48  
121  
19  
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*Appeal from Shelby Circuit Court.*

FRIDAY, MARCH 22.

*Wright, Gatch & Wright, for appellant.*

*Ross & Dailey, for appellee.*



*Per Curiam.*—The defendant and appellant, by its motion, asks that plaintiff shall take nothing further in this cause, and that by the order of this court plaintiff be barred from the further prosecution of the action, and that defendant be discharged from further liability herein, and for 1. PRACTICE in the supreme court: appeal. costs. In support of the motion, certain vouchers and receipts, signed by plaintiff, are exhibited, which show a full settlement of the judgment obtained in the court below, and of all claim upon the cause of action. The attorneys for plaintiff resist the motion, and, among other things, claim that after the rendition of the judgment in the court below, the plaintiff, in writing, assigned to L. W. Ross, one of her attorneys, one-half thereof. It is averred, and the proof submitted by affidavit shows, that one of the attorneys of defendant, before the alleged settlement with plaintiff, well knew that said assignment had been made to said Ross. And it is alleged that the signature of the said plaintiff to said receipts and vouchers was procured by the false and fraudulent representations of the agents and attorneys of the defendant. It is asked, in behalf of plaintiff, that appellant's motion be denied, and that the cause be allowed to proceed to final determination on its merits. This court can, in this cause, do nothing more than exercise its appellate jurisdiction. It is here upon appeal, and we can only try such issues as are properly presented upon appeal. Section 3194 of the Code provides that "The Supreme Court may reverse or affirm the judgment or order below, or the part of either appealed from, or may render such judgment or order as the inferior court or judge should have done, according as it may think proper." We have no general original jurisdiction, and have no lawful power to order that an appellee shall not further proceed with a cause. The motion, and affidavits in resistance thereof, present issues of alleged fraud, and notice of an assignment of part of the judgment, which we cannot try by motion and upon affidavits. It is the appellant's right to withdraw and dismiss its appeal, and stand upon the alleged satisfaction of the judg-

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 Kyne v. Kyne.
 

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ment, if it should be so advised, and let the validity of the satisfaction and settlement be tried in the proper tribunal. Either such a dismissal, or a final submission upon the merits of the appeal, is all that now can be entertained. The motion to discharge defendant from further liability is

OVERRULED.

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 KYNE ET AL. V. KYNE ET AL.

48	21
395	733

1. **WILL: RENUNCIATION OF RIGHTS:** Under the Revision, if the widow did not object to the will of her husband, and relinquish all rights conferred thereby, she was deemed to have accepted under it; nor would her own will, published some years afterwards, be considered a declaration of her intention to renounce her rights under the will of her husband.
2. **—: CONSTRUCTION OF.** Where a will provided that two daughters, among several children, should receive the proceeds of certain life insurance, and that if this did not make their shares equal to those of the other children, the deficiency should be made up from the balance of the estate, *held*, that they were not entitled to the life insurance and, in addition, to as much as each of the other children.

*Appeal from Dubuque Circuit Court.*

TUESDAY, APRIL 2.

THIS action involves the construction of a will. The facts fully appear in the opinion. The plaintiff, with defendant James B. Kyne, in his own right and as guardian, and Absalom Cain, executor, appeals.

*Graham & Cady and W. A. Leathers*, for appellants.

*W. S. Wright*, for appellees.

BECK, J.—I. The cause was submitted upon an agreed abstract, which may be presented here in place of a statement of facts. It is as follows:

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Kyne v. Kyne.

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Michael Kyne died August 27, 1871, leaving a will, which was duly admitted to probate, the provisions of which, so far as material to this cause, are as follows:

"1st. It is my wish and desire that all my just debts be fully paid.

"2d. It is my wish that my property be kept together as much as possible, for the term of five years after my decease; then, when a division of my property becomes necessary, I wish it divided equally among my children, share and share alike.

"3d. It is my desire that all the income from my estate, after the support of my wife and our children, shall be loaned out at interest for the benefit of the children, until a division is made, then, should my wife be living and desirous, she may have her dower of one-third of all my estate, for her own use and benefit, during her natural life.

"4th. I will and bequeath to my two daughters, Julia Ann and Mary Ellen, the benefits which arise from a life insurance policy in the Security Life Insurance Company of New York, for the sum of five thousand dollars, to be divided between them equally; and, should the proceeds of said policy not make their shares equal to the shares of the other children, then they are to receive enough from the balance of my estate to make their shares equal with the best; and should said policy, or the proceeds thereof, be realized by them before they attain their age of majority, then I desire and order the proceeds to be placed at interest, on good security, for the use and benefit of said daughters until they attain their age of majority; and should either of my said daughters die before arriving of age, then her share to go to the other."

Bridget Kyne, his widow, took out letters testamentary, with Absalom Cain as co-executor, and carried on the business of the deceased until her death, October 26, 1876. She never filed any petition for the admeasurement of her dower, nor any paper indicating her election to take under the will,

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Kyne v. Kyne.

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excepting that she left a will, which was duly admitted to probate, disposing of her estate, as follows ;

*"First*, I give and bequeath my sister, Ellen O'Donnell, the sum of fifty dollars, to be paid immediately after death. To Ellen Cook, for her kind attendance on me while sick, one hundred dollars, to be paid immediately after my death. To my daughters, Julia A. and Mary E., two hundred dollars each, to be paid to them when they become of age. And *lastly*, I bequeath the rest of my real and personal estate, (after my legal debts and funeral expenses are paid) to my sons, Mathias Kyne, James Kyne, John Kyne, George Kyne, William Kyne, and Thomas Kyne, between them, share and share alike. Mathias, James and John Kyne, are to have their share on or before two years after my death. The minors, George, William and Thomas Kyne, are to receive their shares when they become of age. Should any of the minors die before becoming of age, his or their share to be divided equally among the balance of my sons living."

Bridget Kyne had no property whatever except such as she acquired from the estate of Michael Kyne, deceased, as his widow.

Michael Kyne left eight children, him surviving, all of whom survived their mother also. They all lived with their mother until her death, and were supported, clothed and educated by her out of the income of the estate. She also received \$300 from the guardian of Julia A. Kyne, which was expended in paying her expenses at school.

The guardian of Julia A. Kyne and Mary E. Kyne collected on the policy of insurance on the life of Michael Kyne \$4,700, which was invested at 10 per cent interest, and the income accruing therefrom reinvested in like manner, except \$300, which was paid over to Mrs. Kyne, as above stated, for the education of Julia A. Kyne.

This action was brought to obtain a judicial construction of the third and fourth paragraphs of the will of Michael Kyne,

## Kyne v. Kyne.

deceased. The court rendered a decree giving the following constructions to the said will :

"1. That Bridget Kyne took only a life estate in the estate of Michael Kyne, and at her death the real estate vested in his heirs unaffected by the provisions of her will.

"2. That the proceeds of the insurance policy on the life of the testator bequeathed to the two daughters, Julia A. Kyne and Mary E. Kyne, vested in them immediately upon its collection, and that the same, and the accumulated interest thereon, belongs to them absolutely, and are not to be taken into consideration in the division and settlement of the estate, and that they are to share equally with the other of the children in the distribution of the remainder of the estate."

II. It will be observed that the testator died in 1871. The statute in force at that time provides that "the widow's dower cannot be affected by any will of her husband, if she objects thereto, and relinquishes all right conferred upon her by the will. Rev., § 2435. This provision requires *action* upon the part of the widow, in order to preserve her right unaffected by the will. She must *object*, and relinquish all rights conferred by the will. Silence, and a failure to perform an act of relinquishment, will authorize the conclusion that she accepts under the will.

It is claimed that the will of the widow was a sufficient declaration of her intention to claim dower and a renunciation of her rights under the will. This view is clearly inadmissible. The will was not operative until the death of the testator making it. Until then it was not a binding instrument; it was *ambulatoria voluntas*. It was unpublished, and in no manner could have been acted upon by others. It was a private declaration of an intention which she was free to change at any time. The property of her estate, at her death, was no other or different than that possessed by her while living. Her will conferred upon her estate no right; it disposed of such property as she held at death, and had no

1. WILL: renunciation of rights.

## Kyne v. Kyne.

other effect. We conclude that the first point of the Circuit Court's decision is correct.

III. In our opinion, the construction which leads to the other conclusion reached by the court below is not in accord with the intention of the testator as expressed in the will. The second clause of the will expressly declares that the children of the testator shall share equally in the division of his estate. The fourth clause directs that the proceeds of his life policy shall be paid to his two daughters. But if the sum received by them from this source would not be equal to the amount allotted to each of the other children, it should be increased out of the other property of the estate, so that his daughters should receive equal amounts with his other children. This direction by no possibility can be followed, if the daughters are to receive the proceeds of the policy in addition to a share in the other property. Indeed, it could not have been introduced into the will by a rational man, without the discovery of the fact that it is incapable of being followed, except by disposing of the property equally among all the children of the testator.

IV. The interest upon the proceeds of the life insurance, accruing prior to the time fixed by the will for the division of the estate among the heirs, is to be regarded as a part of the estate, to be used for the support of the family, and to be distributed to the heirs, other than the two daughters to whom the principal is bequeathed. This construction is clearly demanded by the second and third clauses of the will.

The cause will be reversed and remanded for further proceedings, in harmony with this opinion.

REVERSED.

## CULVER v. WILBERN BROS.

1. **Usury : SURETYSHIP.** If a surety has given his own note in part payment of his principal's usurious debt, he cannot maintain the plea of usury against the holder of the note so given.

*Appeal from Osceola Circuit Court.*

TUESDAY, APRIL 2.

ACTION upon a promissory note. The defendants plead usury. Previous to the execution of the note in suit, the plaintiff held a larger note, executed by one Chambers as principal and the defendants as sureties, which note was usurious. Before its maturity, the defendants took it up, paying a part of the amount thereof in money, and giving their note for the balance. This action is brought upon the latter note. The court sustained the plea of usury, and the plaintiff appeals.

*Chase & Taylor*, for appellant.

*H. Jordan*, for appellees.

ADAMS, J.—We think that the transaction by which the defendants took up the original note was either a payment or purchase, and that in either case the defendants cannot maintain the plea of usury. What the defendants' theory is does

not very distinctly appear; but they speak of the  
 1. **USURY:**  
   **suretyship.** note in suit as a substituted note. We presume that their theory is, that the note was given by way of renewal, and that it is therefore subject to the plea of usury, upon the same ground that the original note would be. If the note was given by way of renewal, it would doubtless be subject to the plea of usury. The question then is: Can the note be properly considered as given by way of renewal? In our opinion, it cannot. To constitute a renewal, the new note should be executed

by the principal. Where there is a renewal, the original note becomes extinguished. In this case the defendants caused the original note to be indorsed to them, and they brought an action in attachment on it against Chambers, averring that they had purchased it. It would be a singular use of language to say that a note which has been renewed is still outstanding and enforceable. We think that where a surety takes up the note of his principal the transaction is necessarily either a payment or purchase. There are decisions which would seem to indicate that it should be regarded as a payment, and not a purchase. The surety can recover only the amount paid by him, even though he takes an assignment of the claim. *Blow v. Maynard*, 2 Leigh, 54. So the statute of limitations begins to run against the surety from the time of payment, if the note was then due. *Hale v. Andrus*, 6 Cowen, 225; *Walker v. Lathrop*, 6 Iowa, 516; *Tillotson v. Rose*, 11 Met., 299. But whether the transaction in this case be regarded as a payment or purchase, the defense of usury is not available. If it be regarded as a payment, the usurious debt is extinguished. The note given in part payment represents a different debt. The original note is discharged. Whatever claim the defendants have upon Chambers is not upon the note, but upon his implied promise to indemnify them. *Copis v. Middleton*, 1 Turn. & Russ., 224; *Hodgson v. Shaw*, 3 Mylne & Keen, 183. They can recover, as we have seen, what they have paid, and no more. If, however, they have given their note in part payment, they can include the amount of the note so given, even though not paid. *Rodman v. Hedden*, 10 Wendell, 498. Nor can a principal maintain a plea of usury against a surety who has paid his usurious debt. This results from the fact that the surety is entitled to full indemnity, and it is his right to pay immediately upon the maturity of the note, and to seek indemnity. He cannot be subjected to the trouble and delay of waiting to be sued, and then of interposing the defense of usury. In our opinion, it follows that if he has given his own note in part payment of his princi-



## Vogel v. Wadsworth.

pal's usurious debt, he cannot maintain the plea of usury against the holder of the note so given. He cannot be allowed to speculate upon his suretyship. Yet that is what the defendants are attempting to do. They have brought an action in attachment to recover the amount of the original note, and are seeking to avoid their own obligation—the giving of which, if they paid the original note, constitutes the sole basis for their recovery.

If the transaction in question could be regarded as a purchase, so as to give the defendants a right of action upon the original note against Chambers, and if Chambers, in such action, could plead usury, still these defendants could not have recourse to their assignor until they have sustained loss by reason of the usurious character of the note. Code, § 2081.

REVERSED.

## VOGEL &amp; BRO. v. WADSWORTH.

48	29
81	439
48	28
115	228

1. **Practice: FINDING OF COURT.** The finding of a court stands as the verdict of a jury, and will not be disturbed unless there is such want of testimony to support it as to raise the presumption that it is not the result of an unprejudiced and honest exercise of discretion.
2. **Estoppel: IN FAIS: COLLATERAL SECURITY.** The plaintiff sold goods to defendant upon the order of a railway company for which defendant was a contractor, and accepted the company's note, secured by mortgage bonds, in payment therefor. In a prior action of foreclosure against the company, in which defendant intervened, claiming a mechanic's lien, it was held that his claim was paid and discharged, and that plaintiff was entitled to hold the bonds against the company.  
*Held:*
  1. That plaintiff was not estopped by the decision in the foreclosure suit to deny that the note was received by him in payment of the claim.
  2. That plaintiff did not, by taking the note of the railway company, discharge defendant, if the note was taken under an agreement with defendant that it should be held as collateral.
  3. That if defendant had paid, at any time before judgment, the claim of plaintiff, he would have been entitled to transfer of the note and the security thereon.

*Appeal from Lee District Court.*

TUESDAY, APRIL 2.

ACTION at law upon an account for goods sold and delivered to defendant. The answer alleges that the goods were sold by plaintiffs, upon the order of a railroad company, and it was agreed between the plaintiffs, defendants, and company, that the latter should pay plaintiffs for the goods; and that it paid the account by its note secured by mortgage bonds, which were accepted by plaintiffs in full payment of the account. The answer further shows that defendant was a sub-contractor in constructing the railroad of the corporation referred to, for which he had a large claim that was a lien upon the road; that the company, upon giving its note to plaintiffs, charged defendant therewith, and that afterwards, in an action brought by the trustee in the mortgage securing the bonds given to plaintiffs, defendant set up his claim against the company as a lien paramount to the mortgage, and it was therein determined that the amount thereof, which was included in the note of the company given to plaintiffs, was paid and discharged, and plaintiff was entitled to hold the bonds against the railroad company.

The cause was tried to the court, without a jury, and judgment rendered for plaintiffs. Defendant appeals.

*McCrory, Hagerman & McCrory*, for appellant.

*Gillmore & Anderson*, for appellees.

BECK, J.—I. The judgment of the District Court is brought here for review solely on the ground that it is not sufficiently supported by the testimony. No other objections are made to the judgment. The court below made no finding of facts. We are left to determine whether the testimony is sufficient to support conclusions of fact, which, in law, authorize plaintiffs to recover.

The main point of fact upon which the controversy chiefly centers, and which, in our view, is decisive of the case, involves the character of the contract under which the note and bonds of the railroad company were received by plaintiffs, whether in payment of the debt defendant incurred for the goods purchased of plaintiffs, or as collateral security. We think there can be no doubt but the court was justified in finding that the goods were sold to defendant. Upon the question above suggested, there is conflict. Indeed, some of the court are free to say that the preponderance of the testimony, as presented to us, is to the effect that the note of the company was given in payment of defendant's indebtedness. But there is not an absence of testimony supporting the other conclusion; nor is the testimony so wanting that we are required to reverse the judgment. The decision of the court below stands as a verdict of a jury, and will be disturbed only in a case which would justify interference with a verdict. In such cases, to authorize us to reverse there must be such want of testimony as to raise the presumption that the verdict or judgment is not the result of the unprejudiced and honest exercise of the discretion of the triers. These rules are familiar, and often announced. We must regard the fact as settled, by the decision of the court below, that the note and bonds of the railroad company were received as collateral security by plaintiffs. There are two or three other facts upon which there was conflict in the testimony; they are, however, collateral or subordinate, and dependent upon the main point, involving the character of the contract under which plaintiffs took the note and bonds. There is no want of sufficient evidence to support the court's finding thereon for plaintiffs.

II. In the foreclosure suit it was determined that defendant should not enforce his lien for the amount of the note given to plaintiffs, and he was chargeable as for that amount of money paid. It is insisted that plaintiffs are bound by this decision. It may be admitted that

1. PRACTICE:  
finding of  
court.

2. ESTOPPEL:  
in pais: col-  
lateral secur-  
ity.

they are bound by the true effect to be given to the adjudication. The decision settled the rights of defendant against the railroad company, and the rights of the holders of the mortgage bonds as against defendant. But there was no issue involving the character of the contract between plaintiffs and defendant, whether the note of the railroad was given and accepted in payment, or as collateral security. That question, not being in issue, was not decided in the case. It cannot, therefore, be said plaintiffs are estopped by that decision to deny that the note was received by them in payment of the claim.

Plaintiffs, being holders of the note as collateral security, were authorized to bring suit thereon. They were held to due care in discharging this duty, and nothing more. They could not be made liable to defendant on account of an erroneous decision in that case. But if the decision was correct, it does not follow that the rights of the parties to this suit are affected thereby.

If plaintiffs took the note of the railroad company as collateral, and in no other way, and, under the arrangements of the parties, the note secured by the bonds was issued to secure plaintiff, it might well follow that defendant's claim and lien, *pro tanto*, would be paid and discharged, while defendant's debt to plaintiffs would remain unsatisfied. It is not at all difficult to see that defendant, under these facts, could not enforce his lien for the sum he had caused to be put in a note, and secured by a bond and mortgage. The claim, while held by plaintiffs, thus secured independent of the lien, may well have been held, as between the railroad company and defendant, paid, and the lien discharged. But as plaintiffs' original indebtedness against defendant was not involved in that suit it could not be held paid and discharged. If the note and bonds of the railway company were indeed received by plaintiffs as collateral, and not in payment, defendant's indebtedness to plaintiff was not paid by the transaction.

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Vogel v. Wadsworth.

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III. It is insisted that the plaintiffs, by taking the note of the railroad company at ninety days, thereby discharged defendant. But this cannot be so, if the note was taken under an agreement with defendant, or under his instructions. The testimony of plaintiffs tended in that direction, and the court's finding of the fact so to be would not be so unsupported as to require us to interfere.

IV. It is also insisted that defendant is discharged from liability to plaintiffs, on the ground that they took a note from the railroad company, which included not only the amount of defendant's indebtedness, but also the other claims held by them. We fail to discover wherein defendant was prejudiced. If he had paid, at any time before judgment, the claim of plaintiffs, he would have been entitled to a transfer of a proper interest in the note, and the security thereon, which could have been done so that his rights would have been protected. *Conover v. Earl*, 26 Iowa, 167. Upon payment, after judgment, he would, in a like manner, have been entitled to a transfer of the proper interest in the judgment, which could have been enforced for his benefit.

V. Finally, it is insisted that the prosecution of the claim by plaintiffs, in their behalf, in the foreclosure proceedings, resulted in defeating defendant's right to enforce his lien for the amount of the note, and thereby he has lost the claim, which would have been good under the lien. But the court was warranted in finding that the note was taken in pursuance of directions of defendant, and with his assent. Holding the claim as collateral security, plaintiffs were authorized to enforce it in the exercise of due diligence. We discover nothing in the record authorizing the conclusion that plaintiffs were negligent in presenting the claim in the foreclosure proceeding. It was a doubtful question whether it was not the more effective way to enforce the debt. It was certainly the only means at plaintiffs' command to enforce it. They could not enforce the lien held by defendant. If defendant had superior knowledge at the time, which enabled

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Pratt v. Nitz.

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him to determine that the safer and better course was to bring the amount of his claim, transferred to plaintiffs, under his lien, he ought to have paid plaintiffs, and had a re-transfer to himself. If he, as well as plaintiffs, were ignorant as to the true course to be pursued, defendant had no grounds to complain of plaintiffs' negligence.

No other questions demand discussion. The judgment of the District Court is

**AFFIRMED.**

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## PRATT V. NITZ.

1. **Parent and Child: CUSTODY OF CHILD:** Where, upon the application of the father of an illegitimate child for the custody thereof, it appeared that his moral character was no better than that of the mother, and that she had a natural affection for the child, neither neglecting, abusing, nor failing to provide for it, it was *held*, that the custody of the child should not be awarded to him.

*Appeal from Black Hawk Circuit Court.*

TUESDAY, APRIL 2.

It is alleged in the petition that the plaintiff is the father of Ettie Nitz, a female child, of the age of about two years, and that defendant is the mother of said child; that defendant has said child in her care and custody, and under her control; that she is an improper person to have the control and education of said child, for that she is a woman of grossly immoral character, and of lewd, vicious, and brutal habits and conduct.

The prayer of the petition is, that plaintiff be appointed guardian of said child, and that the custody, care and education of the same be entrusted to him.

The defendant admits that plaintiff is the father of said child, and defendant the mother. She denies that she is an

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Pratt v. Nitz.

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improper and unsuitable person to retain the custody and control of said child, and denies that she is of gross, immoral character, and of lewd, vicious and brutal habits and conduct. She avers that she is the natural guardian of said child, and is in every way a proper and suitable person to take care of and rear said child, according to its condition in life; and that to take said child from her, at its present age and condition, would be an act of great cruelty to the child as well as defendant.

She further avers that plaintiff is not a suitable person to entrust with the care and custody of said child; that he is an immoral, lewd and vicious person; that he is not a truthful man; that he is a single man, without family, wife, father or mother, and that to entrust said child to his custody would be an act of great cruelty to the child and to defendant.

The cause was tried by the court, and the custody of said child given to the plaintiff. Defendant appeals.

*Alford & Elwell, for appellant.*

*C. W. Mullan, for appellee.*

ROTHROCK, CH. J.—The plaintiff and defendant are both unmarried. For a time prior to the birth of the child, defendant lived and cohabited with plaintiff at his home.

The child in controversy was the offspring of this illicit cohabitation. Some time before the birth of the child the defendant left plaintiff's house and became an inmate of the County Poor House, where the child was born. The plaintiff did not acknowledge the child as his own, and proceedings in bastardy were instituted against him, which he resisted.

By the judgment of the court, he was charged with the support of the child, and required to pay \$2.50 per week for that purpose. He appealed to this court, and the judgment

1. PARENT  
AND CHILD:  
custody of  
child.

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Pratt v. Nitz.

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of the court below was affirmed. *State v. Pratt*, 40 Iowa, 631.

He instituted this proceeding to deprive defendant of the custody of the child, under sec. 2301 of the Code, upon the ground that the defendant is an improper person to have the custody of the child, because she is of lewd, vicious and brutal habits and conduct. The defendant insists that plaintiff is a lewd, vicious and immoral person, and is otherwise unfit to have the control and custody of the child.

It appears from the evidence that the defendant and her child now reside with her father; that she is also the mother of another illegitimate child, which was born some years before the one now in controversy. A sister also gave birth to an illegitimate child. All the witnesses concur in stating that the character of the family is not good, but that they have no knowledge of any improper conduct of the defendant since the birth of this child.

It appears that she has the natural affection of a mother for the child, and there is no evidence that she has ever neglected it, abused it, or failed to properly care for it.

There is no evidence tending to show that the plaintiff is a proper person to have the custody and control of the child. On the other hand, there is much in the case that leads the mind to an opposite conclusion. His moral character is no better than that of defendant.

He took this woman to his house and cohabited with her; and when she became pregnant, sent her to the poor house, that, in addition to the stain of illegitimacy, the child might be ushered into the world as a pauper.

He denied that he was the father, and defended against such claim to the last. It does not appear that he is in a situation to properly care for an infant two years of age. He must necessarily put it in the care of others.

We are clearly of the opinion that the custody of the child should not be awarded to him, and that for the present, at least, it should remain with the mother. It will be time



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Brodv v. Rohkar.

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enough to interfere with her control over it when it arrives at an age to be corrupted by her immoral acts, if she leads such a life in the future as she did prior to the birth of the child.

REVERSED.

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BRODT V. ROHKAR ET AL. AND WILSON ET AL.

1. **Mechanic's Lien: PRIORITY OF MORTGAGE.** In an action to foreclose a mortgage, executed while the Revision was in force, it was *held* not to be competent for the decree to provide that the realty should be sold and the proceeds distributed, in a certain proportion, between the mortgagee and the holder of a mechanic's lien upon a structure erected on the land covered by the mortgage.

*Appeal from Lee Circuit Court.*

TUESDAY, APRIL 2.

In August, 1871, the defendants, Louisa Rohkar and Edward Rohkar, executed to the plaintiff a mortgage on certain real estate described in the petition, and which, on the same day, was duly filed for record in the recorder's office. This action is brought to foreclose the same. Certain persons were made defendants, who, it is alleged, were junior lien holders, or claimed some interest in the premises; but that whatever that interest was it is junior to that of plaintiff.

The decree of the Circuit Court settled and adjusted the liens and claims of said parties, and no question is made as to the correctness thereof on this appeal.

At the time the mortgage was executed, there were on said premises certain buildings, which were afterward destroyed by fire, and in 1875 and 1876 the intervenors, John Wilson and others, as mechanics and material men, under a contract with Louisa and Edward Rohkar, erected other buildings in the place of those destroyed, and they, by proper pleadings, seek to have their lien, as such, established and enforced.

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 Brodt v. Rohkar.
 

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The court found the real estate, without the buildings, was of the value of \$1,200, and with the buildings, it was of the value of \$2,000.

It was further found and decreed that plaintiff's mortgage was a prior lien on the real estate, as it existed before the buildings were erected, and that the intervenors had the prior lien on the buildings. The premises were ordered to be sold together—that is, the land and buildings. The costs were decreed to be first paid, and if the remaining proceeds were insufficient to pay the plaintiff and intervenors, the plaintiff was to receive 12-20 and the intervenors 8-20 of such proceeds. The plaintiff appeals.

*H. C. Stempell and Van Valkenburg & Hamilton*, for appellants.

*Miller & Alley*, for defendants.

*Casey & Hobbs*, for intervenors.

SEEVERS, J.—I. The mortgage having been executed in 1871, the lien thereof became, from that time, a fixed and vested right, and must be governed and controlled by the laws then in force, unless the same have been in some valid manner changed or abrogated, so as to legally change the status or lien of the mortgage. At the time the intervenors furnished the materials for, and performed the work and labor on, the buildings, they had notice of the mortgage, and their rights are subject thereto. The plaintiff did nothing to displace his lien, nor did he in any manner waive his full and complete rights under the mortgage.

We understand the plaintiff concedes, as the buildings erected by the intervenors are independent structures, and not mere additions to buildings on the premises at the time the mortgage was executed, that the intervenors have the prior lien thereon and may sell the same under execution, and that the purchaser may have a reasonable time to remove such

1. MECHANIC'S  
LIEN: priority  
of mortgage.

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Brodt v. Rohkar.

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buildings. Rev., § 1855. Such is the ruling in *Getchell et al. v. Allen*, 34 Iowa, 559. But he insists that defendants have no lien on the land, and that, therefore, as against him, and without he consents thereto, the court had no power to order a sale of the land and buildings together, and then distribute the proceeds on what was believed to be an equitable basis. In other words, the plaintiff insists that he is entitled to have the land sold by itself, and is entitled to the whole of the proceeds, and that the buildings may be sold separate and apart from the realty and removed therefrom, and that the intervenors are entitled to the proceeds of such sale.

The lien of the intervenors is statutory, and the rights of these parties must be governed and determined by Rev., § 1855, which provides: "The lien for the things aforesaid, or work, shall attach to the buildings, erections, or improvements, for which they were furnished or the work was done, in preference to any prior lien or incumbrance, or mortgage upon the land upon which said buildings, erections, or improvements have been erected or put, and any person enforcing such lien may have such building, erections, or improvements sold under execution, and the purchaser may remove the same within a reasonable time thereafter."

It is quite clear, we think, as between the plaintiff as prior mortgagee and the intervenors, that this statute does not give the latter any lien on the land, and it is equally clear they have such lien on the buildings, but that the mode, manner, and extent to which it can be enforced is fixed and declared by statute.

The manner of enforcing the lien of a mechanic was, under the Revision, by an ordinary proceeding or action at law. Rev., § 4183.

It is not claimed, and we do not think it could be successfully maintained, that a court of law, under these statutes, could enlarge the rights of a mechanic, or give him a lien on something more than the statute did.

When this action was commenced, the Revision had been

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Brodt v. Rohkar.

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repealed by the Code, and sec. 2510 provides that the action to enforce the lien of a mechanic shall be by equitable proceedings, and it is insisted that, as this latter statute applies solely to the remedy, it is now competent for the court, by virtue of its general equity powers, to do what the court below did. The argument is that the statute uses the word "may" instead of "must," and that, therefore, it does not prohibit the court from exercising other modes than the statutory one, if thereby equity and justice will be more nearly obtained. But the difficulty in this line of thought is that thereby the mechanic, against the consent of the prior mortgagee, participates in whatever advantage there may be arising from a sale of the land and buildings together; whereby, in substance, as against the prior incumbrancer, he obtains all the benefits that could possibly result from a lien on the land, just what the statute declares he does not have. It is doubtful, to say the least, whether any court is vested with such power. The necessity of determining this question, however, does not exist.

It is conceded, on all hands, that the General Assembly may, at its will and pleasure, alter, change and repeal statutes relating to the remedy. But this, we apprehend, cannot be done, if thereby any vested right is substantially impaired. But be this as it may, sec. 50 of the Code provides that the repeal of existing statutes shall not affect "any act done, any right accruing, or which has accrued." At the time of this repeal, and the taking effect of the Code, the debt secured by the mortgage was not due; but it soon thereafter became due and payable. The right of the plaintiff, therefore, at the time the Code took effect, was "accruing," and it was "accruing right" to have his lien enforced and determined in accord with the law in force at the time the mortgage was executed. *Holland v. Dickerson*, 41 Iowa, 367.

II. The decree of the court below is in accord with, and no doubt was based on, chapter 100 of the laws of 1876. This statute repeals all previous statutes relating to mechanics' liens. The first section provides, \* \* \* \* "that

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 Blough v. Van Hooresbeke.
 

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this repeal shall not affect any contract already made, executed or executory, or impair any right whatever arising under the law repealed." Under this, the plaintiffs' rights, as provided in the then existing statutes, are fully preserved. What has been heretofore said in relation to sec. 50 of the Code is fully applicable here.

REVERSED.

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BLOUGH v. VAN HOORESBEKE,

1. **Practice in the Supreme Court: TRIAL.** A case tried as a chancery case in the court below will be reviewed in the supreme court under the rules and practice applicable to equity causes, regardless of the character of the case, and of the relief sought.
2. **Practice: SETTING ASIDE OF DEFAULT.** The court below may impose the conditions upon which it will set aside a default, and its action therein will not be reviewed unless an abuse of discretion is shown
3. **Practice in the Supreme Court: TRIAL DE NOVO: EVIDENCE.** Upon the trial *de novo* of a case on appeal, questions involving the competency and admissibility of testimony come up as original questions upon the objections made on the trial below, and are not passed upon in review of the decision of the inferior court.

*Appeal from Jefferson District Court.*

TUESDAY, APRIL 2.

**ACTION in Chancery.** There was a decree in the court below granting the relief prayed for in the plaintiff's petition. Defendant appeals. The facts of the case appear in the opinion.

*Glenn & Kirkpatrick and Slagle, Acheson & McCracken, for appellant.*

*Stubbs & Leggett, for appellee.*

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 Blough v. Van Hoorebeke.
 

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BROOK, J.—I. The petition alleges that plaintiff purchased of defendant an imported French Boulonnais stallion, for the sum of \$1,500, \$300 cash, and the balance in deferred payments secured by promissory notes; that defendant represented and warranted the horse to be sound and free from blemish, and in good condition; that the animal proved to be unsound, and wholly unfit for use as a stallion, the purpose for which he was purchased, and which was contemplated by the representations and warranty; and that defendant has in his possession the promissory notes given for the deferred payments upon the purchase of the horse. Various amendments to the petition were filed, which need not be further noticed. The relief claimed is, that the defendant be restrained and enjoined from negotiating the notes, and that they be, by the final decree, cancelled, and judgment rendered for the damages sustained by plaintiff as set out in the petition. Upon the filing of the petition a preliminary injunction was allowed, restraining defendant from transferring the notes. Upon the final hearing a decree was entered cancelling the notes, and a judgment was rendered for \$776 and costs against defendants.

At the appearance term, upon agreement of the parties, the cause was, by order of the court, set down for trial upon written testimony, as provided by Code, § 2742, and was so tried.

II. Under the provisions of the Code just cited, the cause upon this appeal must be tried in this court *de novo*. But it is not so presented that it can be tried in the manner required by law. The abstract fails to show that we have before us all the testimony submitted to the court below. It is nowhere so stated in the abstract, and we cannot determine from an examination of its contents that it contains all the testimony in the case.

The statute just cited provides that cases tried as this was in the court below shall be tried here *de novo*. We can try this case in no other way. It is not competent for the appellant to determine that the cause shall be tried here upon

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 Blough v. Van Hoorebeke.
 

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errors. His option cannot give us jurisdiction not bestowed by the statute.

The character of the case, and the relief sought by plaintiff, do not determine the manner of trial in this court. Having been tried as a chancery case in the court below, it will be reviewed here under the rules and practice applicable to equity causes. *Richmond v. The Dubuque & Sioux City R. Co.*, 33 Iowa, 422; *Van Orman v. Merrill*, 27 Iowa, 476.

III. The defendant assigns errors upon the record, some of which involve the merits of the case, and upon these assignments the cause is discussed by his counsel as though it were on trial *de novo*. Other assignments of error relate to preliminary and incidental proceedings, which we will quite briefly consider.

A default was entered, and, upon a showing of defendant, was set aside upon conditions that he should plead issuably, and at once, and pay certain costs within a time prescribed.

2. PRACTICE:  
setting aside  
default.

The conditions imposed are made the grounds of complaint in the assignment of errors and argument of defendant. The court was clothed with ample authority to impose the terms upon which the default was set aside. Code, § 2871. The exercise of this authority rested upon the sound discretion of the judge, and this court will not interfere therewith unless abuse of that discretion be made to appear. See cases cited in Withrow & Stiles' Digest, p. 390. The record fails to show the absence of the exercise of sound discretion in imposing the terms upon which the default was set aside.

IV. Other assignments of error are based upon the action of the court in overruling objections to testimony and motions to suppress certain depositions, and specified interrogatories in other depositions. As we have seen, this case can only be tried here *de novo*. Upon such a trial, questions involving the competency of testimony and the admissibility of depositions come up as original questions upon the objections made in the court below, and upon

3. PRACTICE IN  
the supreme  
court: trial de  
novo: evi-  
dence.

## State v. Danforth.

their decision the testimony is considered or rejected by us, as the case may be. If the testimony is found to be competent, and the depositions regularly taken, they are admitted notwithstanding the ruling of the court below. No judgment is entered reversing that decision. It then appears that questions of this kind are not passed upon here in review of the decision of the inferior court. It will be understood that we refer to cases like this one before us, where the testimony, which is the subject of controversy, appears in the record. If it should occur that rejected testimony is not permitted to become a part of the record, which under our practice may occur, the ruling in such case would be the subject of review, and, if found erroneous, would demand a reversal of the decision, and the remanding of the cause. But the better, and we apprehend the usual, practice of the *nisi prius* courts is to permit all testimony to which objections are sustained to be made of record, so that, if held admissible here, it may be considered upon the trial in this court.

We have considered all questions involved in this case, and conclude that the judgment of the District Court ought to be

AFFIRMED.

## THE STATE V. DANFORTH.

1. **Evidence: SEDUCTION: CORROBORATION OF PROSECUTRIX.** In the trial of an indictment for seduction, the infant alleged to be the fruit thereof cannot be offered in evidence to corroborate the prosecutrix by reason of a supposed resemblance between the child and the defendant.

48	43
112	417
48	43
1140	544
48	43
e144	258
e144	259

*Appeal from Poweshiek District Court.*

TUESDAY, APRIL 2.

THE defendant was indicted for unlawfully having carnal knowledge of a female, by administering to her a substance, and



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State v. Danforth.

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by other means producing such stupor and imbecility of mind and weakness of body as to prevent effectual resistance.

Upon a trial there was a verdict of guilty, and judgment that defendant be confined in the penitentiary for ten years. Defendant appeals.

*John F. Lacey and W. R. Lewis, for appellant.*

*J. F. McJunkin, Attorney General, for the State.*

ROTHROCK, CH. J.—The following is the substance of the testimony of Ellen N. Patterson, the complaining witness:

On the evening of the 21st day of February, 1875, witness and her brother, Fred. Patterson, went in a sleigh to Lynnville, to meeting. The defendant was at the meeting. At the edge of town, as they were starting home, defendant called Fred. to him, and they took a drink of liquor together. About a half mile further on, Fred. called to defendant, who was in the sleigh behind witness and her brother, to get into the sleigh with them, which he did. Defendant took out his bottle and both he and Fred. put it to their mouths, and then defendant handed it to the witness. She said she did not want any, but her brother said to take a drink; it was nothing but whisky. She took a small sup. They drove on a little further, and the sleigh broke down. They tried to fix it, and failed to do so. They were then over a mile from Searsboro, the place of defendant's residence. Defendant proposed that Fred. should take the team home, and that the witness should walk over to defendant's house with him. They walked along together and talked about the sleigh breaking down. Stopped once to see if Fred. was going all right with the team, and looked back, but did not see him. Defendant said he thought Fred. was drunk, and witness said she guessed so too. The next thing she knew, she was in defendant's saloon in Searsboro, near midnight, sitting on a bench beside defendant, with her head on his shoulder, and his arm around her, and her drawers unfastened. She went to the door

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State v. Danforth.

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and found it was locked. Asked defendant to take her home. He unlocked the door and took her to his house, which was near by. She knew, by a smarting sensation, that defendant had had intercourse with her; but was unconscious of it at the time. On the way to the house defendant said: "I am up to this kind of business." He unlocked the door of his dwelling-house, and took witness into the sitting room. and then went to the bedroom and told his wife, who was in bed, that the sleigh had broken-down, and that he had brought witness home with him to stay all night. Witness slept with defendant's wife. While undressing she noticed that her clothing was soiled with blood stains. She took breakfast at defendant's house, and remained there until 10 o'clock the next day, when her brother came after her, and she went home. She was delivered of a child on the 9th day of November, 1875. She was sixteen years old in April, 1875. She had frequently visited defendant's, being on friendly terms with his wife. Witness was in the habit of drinking when she did not feel well. She rather liked a whisky sling, and usually took one when she was unwell. It was whisky that defendant gave her, and there was nothing bitter or peculiar in its taste. She thought it was nothing but whisky straight. She did not drink any that evening, except the sup in the sleigh. In walking home with defendant, he did not take her arm or hand, and she did not take his, and they did not go out of the road. She made no complaint to any one of the outrage upon her for sixteen weeks afterwards.

Fred. M. Patterson, brother to the complaining witness, testified, upon the trial, that defendant gave him a drink in the street after church, and that after he and his sister got into the sleigh and started home defendant got into the sleigh. After going about a mile and a half the sleigh broke down, and he told his sister she had better go home with defendant, and he would take the horses home. He started the wrong way, and met a man who told him he was going the wrong road, and he then went home, and took the harness off the

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State v. Danforth.

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horses. This witness says: "*I do not know whether my sister drank any at all that night; I can't say.*" He also stated that he did not remember whether defendant offered him anything to drink in the sleigh. He stated that he went after his sister about noon next day, and that she made no complaint, and he noticed nothing unusual about her. The State offered to exhibit the child to the jury, to which the defendant objected. The objection was overruled, and the infant was shown in evidence to the jury.

The foregoing is the substance of all the evidence, bearing upon the facts, which was offered by the State upon the trial.

Under section 4560 of the Code the defendant can not be convicted upon the testimony of the person injured, unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense.

The testimony of the complaining witness in this case is a most improbable story upon its face.

But conceding it to be true that a woman, in the habit of drinking whisky, should take a small sup of what she supposed to be whisky out of a bottle from which others were drinking, and, while walking a mile, or thereabouts, should suddenly become unconscious, and remain in such a state of obliviousness that a man could have criminal intercourse with her without her knowledge, yet we do not believe there was any corroborating evidence tending to connect the defendant with the commission of the offense.

There is not a fact sworn to by Fred. M. Patterson but what is perfectly consistent with the defendant's innocence. All that can be claimed from his testimony is that he and his sister and the defendant were riding in the sleigh together; that the sleigh broke down; that he took the horses home, and his sister and defendant started to walk to defendant's house; and that about noon next day he took her from there to her home.

The fact that the complaining witness was delivered of a child at the end of about the usual period of gestation from

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State v. Danforth.

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that night does not connect the defendant with the commission of the offense charged. Aside from her testimony, there is nothing in the evidence, excepting the mere opportunity afforded by the parties being together, and this by accident, and under circumstances having no natural or reasonable tendency in the direction of guilt upon the part of the defendant.

The court instructed the jury as follows: "If you find that the child resembles the defendant as children resemble their fathers, and your judgment and experience teach you that there is anything reliable in this appearance that would be safe for you to form an opinion on, then you may consider these matters (meaning this and other facts recited in the instructions) in corroboration of the prosecutrix, and also as testimony to connect the defendant with the commission of the crime charged."

An instruction in substantially the same language was given in the case of *Stumm v. Hummel*, 39 Iowa, 478, and it is urged by the Attorney General that this court approved the same. The question as to the right to offer the child in evidence does not appear to have been raised in that case. The court (BECK, J.) said: "This instruction is said to be erroneous, because it does not confine the consideration of the jury to family resemblance. Certainly nothing else could have been understood by the jury. The word resemblance here used implies that likeness ordinarily seen between child and father."

In the case at bar the defendant objected to the child being shown to the jury, and excepted to the instructions, and insists that the action of the court was erroneous, not because the instruction was not clear and distinct in language, but because the resemblance of infants to the father is too indistinct and uncertain to be allowed as evidence in a case of this character. In this view we concur. This child was about three months old at the time of the trial. We have found that aside from this there was no corroborating evi-

Gunsaulis v. Cadwallader.

dence to warrant a verdict of guilty, and it would be a most unwise and dangerous rule to hold that a man may be deprived of his liberty by reason of a supposed resemblance between a child of that age and himself. See *Rink v. The State*, 19 Ind., 152; *Kensington v. Rowe*, 16 Me., 38.

We think the evidence was insufficient to support the verdict. We need not discuss the other questions presented in the argument of counsel.

REVERSED.

## GUNSAULIS V. CADWALLADER.

1. **Practice: COUNTER-CLAIM: FORMER ADJUDICATION.** Where a counter-claim is embraced in the issue at the time of final submission and judgment, the plaintiff is entitled to immunity from any further action thereon.

*Appeal from Mahaska Circuit Court.*

TUESDAY, APRIL 2.

WILLIAM CADWALLADER filed a petition in the Mahaska District Court, claiming of James Gunsaulis and John Gunsaulis the sum of \$264.50.

On the 15th day of April, 1876, the defendants in that action caused to be served upon Cadwallader a written notice, as follows: "You are hereby notified that defendants in the above entitled cause, by way of compromise, offer to confess judgment in favor of the plaintiff in the sum of twenty-six dollars, and all costs accrued up to this date. This offer is by way of compromise, and, if not accepted within five days, shall bear the same effect and force as provided by law. This offer is made under chapter 11, title 17, of the Code of Iowa of 1873."

After the service of this offer, and before the acceptance of it, the defendants answered, denying all the allegations of the

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Gunsaulis v. Cadwallader.

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petition, and alleging that Cadwallader was indebted to them in the sum of \$45, for the use of two granaries rented to Cadwallader by James Gunsaulis.

On the 20th day of April, 1876, the following judgment was entered: "In this cause plaintiff accepts defendants' offer for judgment, and, therefore, it is ordered and adjudged by the court that the plaintiff have and recover of the defendants the sum of twenty-six dollars and costs of suit, taxed at \$\_\_\_\_\_."

On the 22d day of April, 1876, the following record was made: "In this cause the defendant dismisses his counter claim, and the plaintiff at the time excepted."

On the 23d of June, 1876, the plaintiff in this action commenced an action against the defendant herein, before a justice of the peace, on the following account:

To rent of granaries from September, 1874, to	
March 1, 1876, at \$2 per month	\$36.00
To pasturing cow from January 1, 1875, to April	
13, 1875, at 75 cents	1.87
To pasturing calf from January 1, to February 1,	
1875	50
To sundries, hauling	2.00
	<hr/>
	\$40.37

The defendant answered, in the first count denying all the allegations of petition and claim. In the second count, pleading a former adjudication of all the matters set up in plaintiff's petition, by a judgment of the District Court of Mahaska county, at the April Term, 1876, in a suit wherein William Cadwallader was plaintiff, and James Gunsaulis and John Gunsaulis were defendants. In the third count, alleging that all the matters sued on in this case were settled, by an entry of settlement in said District Court, in an action between the parties above named. The justice rendered judgment for plaintiff for thirty dollars for the use of the granaries, and

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Gunsaulis v. Cadwallader.

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allowed nothing for the other items of the account. From this judgment the defendant appealed.

In the Circuit Court it was conceded by counsel for the defendant that plaintiff was entitled to recover twenty dollars on his account, if defendant should fail in his defenses set up in the second and third counts of his answer; and that a written offer to that effect had been made by defendant to plaintiff, and duly accepted by plaintiff, said offer and acceptance being made under section 2901, Code of 1873. The Circuit Court rendered judgment for plaintiff for \$20. The defendant appeals. The judge gave the proper certificate for the prosecution of the appeal.

*Williams & McMillen*, for appellant.

*John F. Lacey and O. G. C. Phillips*, for appellee.

DAY, J.—It was proved, upon the trial, that the claim for rent of granaries, sued upon before the justice, is the same as that set up in the answer in the action above referred to in <sup>1 PRACTICE:</sup> the Mahaska District Court. In the trial in the Circuit Court no evidence of plaintiff's claim was introduced, except the concession of defendant's counsel, that plaintiff was entitled to recover twenty dollars on his account, if defendant should fail in the defenses set up in the second and third counts of his answer. In finding for the plaintiff the sum of twenty dollars, the court must have found that these defenses were unavailing. In this holding we think the Circuit Court erred. We need not determine whether the offer to confess judgment in this case, continuing to be extended after the counter-claim was filed, was an offer to confess judgment for twenty-six dollars, after satisfying the defendant's counter-claim. If it was such an offer, then it follows, as a matter of course, that the acceptance of the offer, and judgment thereon, is a satisfaction of the counter-claim, and a bar to any further action thereon. If it was not such an offer, but simply embraced

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the claims set up by plaintiff's petition, then it was the right and the duty of the defendant either to withdraw the counter-claim before final submission, or to introduce evidence in support of it, if he had any to offer. Section 2847 of the Code, (3130 of the Revision) provides: "The defendant may, also, at any time before the final submission of the cause to the jury, or to the court, when the trial is by the court, dismiss his counter-claim without prejudice." Section 3127 of the Revision, (2844 of the Code,) respecting the dismissal of the plaintiff's action, was construed in *Hays v. Turner*, 23 Iowa, 214, and it was there held that the plaintiff cannot take a non-suit after the case has been finally submitted to the court. The reasoning of that case applies to the dismissal of a counter-claim. No effort was made to withdraw the counter-claim, nor was there any intimation that it was not to be concluded by the judgment, until two days after the judgment was rendered.

The case of *Schmidt v. Zahensdorf*, 30 Iowa, 498, seems to be conclusive of this question. We quote from that case as follows: "The plaintiff, in his petition, averred the facts constituting his right to, and made a claim against defendants for, use and occupation of the land in controversy, to the extent of \$300. This claim was denied by the defendants. With the issue thus made, the case was submitted to the court. The judgment entry recites that, there being no evidence offered by either party as to the value of the rents and profits, the same is not considered, and no judgment hereby rendered touching the same. The action for the rents and profits was not dismissed, nor the claim therefor withdrawn. The defendants having been thus once compelled to litigate the question and prepare for this defense, they have a right to judicial immunity from being again required to answer the same claim. The judgment will be so modified as to make the same final against plaintiff's claim for rents and profits." In the case at bar, also, the counter-claim was embraced in the issue, at the time of the final submission and judgment, and



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the defendant is entitled to immunity from any further action thereon. The withdrawal of the claim, after judgment, cannot affect the status created by the judgment.

The judgment of the Circuit Court is

REVERSED.

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 MUSSER V. CRUM ET AL.
 

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1. **Pleading: ATTORNEY'S FEE.** Where a promissory note provided for "attorney's fees, and other costs and charges, if the same is not paid when due," it was *held*, in an action thereon, that an answer which put in issue a separate count, containing a claim for attorney's fees, did not also put in issue a count claiming on the note.
2. ———: ———: **COSTS.** The attorney's fees, when thus provided for in the notes, should be treated as a part of the costs, and the defendant was not, therefore, entitled to a jury. *SEEVERS and DAY, JJ., dissenting.*

*Appeal from Johnson Circuit Court.*

TUESDAY, APRIL 2.

ACTION upon two promissory notes. The petition contains three counts, the first and second upon the two notes respectively, and the third states that each of the notes provides for an attorney's fee for the collection thereof, if the notes are not paid when due. It further states that the notes are due; that the defendants have failed to pay the same; and that six hundred dollars would be a reasonable attorney's fee. Answer was made to the last count only. It was denied that six hundred dollars was a reasonable attorney's fee.

On the 15th of October, 1876, the court rendered judgment on the first two counts for want of an answer. On the 20th of October the defendant moved the court to set aside the judgment which had been rendered upon the first two counts, and demanded a jury trial upon the two counts. The court overruled the motion, and the defendants excepted.

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90	656
48	52
102	281

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On the same day the court, against the objection of the defendants, proceeded to the hearing of the cause upon the third count, to-wit, as to the attorney's fee. The defendants demanded a jury trial, which the court refused to grant, and to the ruling the defendants excepted. The court proceeded to hear testimony as to the attorney's fee, and allowed the plaintiff \$450 to be taxed as part of the costs in the case. To the action of the court in this respect the defendants excepted, and now appeal.

*Remley & Swisher*, for appellants.

*Edmonds & Younkin*, for appellee.

ADAMS, J.—I. No answer or other pleading having been filed to the two first counts of the petition, there was no  
1. PLEADING:  
attorney's fee. error in rendering judgment thereon. Code, § 2856. It is claimed, it is true, by the defendants, that there was in effect an answer to the first two counts. Their position, as we understand it, is this: That an attorney's fee is provided in each note; that a note is but one contract; that a count upon a note, which calls for an attorney's fee, should cover the claim for fee; that if the plaintiff undertakes to set up such claim in a separate count, he should have no advantage from such improper pleading; that properly there should be as many counts as notes, and no more; that the court should construe the petition as containing that number, and consider the averments as to attorney's fee as belonging to the counts on the notes; that the answer, then, which puts in issue the averments as to the attorney's fee, should be considered as putting in issue the counts upon the notes; and that it was, therefore, error to render judgment upon the counts upon the notes as for want of an answer.

The position is certainly ingenious, but we do not think it can be maintained. Our reasons will be given in considering

the action of the court in denying a jury to assess the attorney's fee.

II. The correctness of the action of the court in denying a jury must depend upon whether the plaintiff was entitled to <sup>2.</sup> —: —: a judgment for attorney's fee as a part of the <sub>costs.</sub> judgment upon the notes, or merely as costs. If the attorney's fee was recoverable as costs, a jury was properly denied. The language of each note is: "We, or either of us, promise to pay to the order of R. Musser, at Iowa City, five thousand dollars, with interest thereon at ten per cent per annum, together with all attorney's fees, and other costs and charges for the collection thereof, if the same is not paid when due, for value received." It will be observed that it is not expressly provided that the attorney's fee shall be regarded as costs, but the term "other costs" would so imply. In opposition to this view, it is insisted that an attorney's fee would be due from defendants if the notes were collected by an attorney without suit; that in such case it could not be regarded as costs in the sense of taxable costs, for costs cannot be taxed without suit. Whether, if the claim had been collected by an attorney without suit, the costs of collection could be recovered, we need not determine. Such question is not before us. The fee sought is for prosecuting the suit. There is a suit in which it may be taxed, and we think it is recoverable in that mode. It was held in *Nelson v. Everett*, 29 Iowa, 184, that a reasonable attorney's fee may be recovered without any averment in the petition as to what is reasonable. One reason given is that "the plaintiff could not aver what a reasonable attorney's fee would be, until the services were rendered." The fee is earned in the progress of the case, as other taxable costs are earned. There is certainly much propriety in treating it as costs. We think that the action of the Circuit Court, in so treating it in this case, was correct.

III. The defendants say that the judgment upon the notes was erroneously rendered, because, as they say, the case had been set down for trial upon a certain day, and that

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Musser v. Crum.

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before that day arrived, and in the absence of defendants' counsel, the case was called up and the judgment rendered. They claim, therefore, that they were entitled to have the judgment set aside. It is not, however, claimed that there was any defense to the notes, or that defendants were in any way prejudiced. Their application to set aside the judgment was, we think, properly refused.

**AFFIRMED.**

SEEVERS, J.—Being unable to assent to the conclusion reached in the foregoing opinion, I desire to briefly state my reasons for dissenting therefrom.

The amount of attorney fees the plaintiff is entitled to recover was not fixed by contract. Such amount is in the nature of unliquidated damages. The amount of recovery was put in issue by the answer. The plaintiff was required to introduce proof on the subject. The issue formed by the pleadings was either one of law or fact. It was not the former, and, therefore, must have been the latter. Such issue, and the effect of the testimony relating thereto, must be passed upon by either the court or jury. The action in which the issue was joined, and proof required, was an ordinary proceeding. The Code provides, "Issues of fact, in an ordinary proceeding, must be tried by jury, unless the same is waived." § 2740. There has been no waiver of a jury, and I therefore conclude this issue of fact should have been tried by jury. The notes simply provide that the amount of attorney's fees, when properly ascertained, shall be taxed as a part of the costs, and by no means provide or determine the question how the amount is to be ascertained.

Costs, as a general rule, are fixed by statute. In exceptional cases, only, can the court determine the amount thereof, and such cases are usually defined by statute.

It is true the fee is earned during the progress of the case,

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but this by no means determines the question. Nor can it be said to be a legitimate argument against the right of a party to have a jury. DAY, J., concurs with me in the view here taken.

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THE UNITED STATES ROLLING STOCK CO. v. POTTER.

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126 671
1. **Practice: DEFAULT: ADMINISTRATOR.** Where one of four executors resigned, it was *held*, that service of notice upon him eight months after his resignation, in an action against the executors as such, conferred no jurisdiction to enter judgment by default.
  2. **Contract: CONSTRUCTION OF.** A contract between a party and a railroad company provided that he should furnish for the latter a specified sum of money to be expended as designated; and also, that he should be president, and should take possession of, and operate the road to the best advantage, devoting the earnings to certain specified objects, operating the road in the name of the company, and being paid for his services: *Held*, that the contract did not constitute a lease, and that his individual estate was not liable upon a contract entered into by the company prior to his contract therewith.

*Appeal from Des Moines Circuit County.*

TUESDAY, APRIL 2.

THE plaintiff filed its petition against O. W. Potter, Samuel R. Mumford, George H. Wyman, and T. C. Owen, executors of the estate of Eber Ward, deceased, representing that about May 10, 1873, plaintiff entered into a written contract with the Burlington and Southwestern Railway Company, agreeing to rent said company certain rolling stock, to be used upon said railway company's road, at eight dollars per day for each locomotive; that about May 10, 1873, in accordance therewith, two locomotives and tenders were delivered to said railway company, and were used on said railway from then till November 30, 1873; that plaintiff was to be reimbursed for insurance, for which it has paid \$91.80; that August 11,

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1873, the Burlington and Southwestern Railway Company did grant, demise and lease unto Eber B. Ward all their entire line of railway, said lease to continue for a term of five years from August 11, 1873; that said lessee was to pay, as per his said lease, out of the earnings of said road, all the running expenses, and all other charges which said company might become liable to pay on account of operating said road; that in accordance with said contract said Ward took possession of said road, and all property in its possession, and said rolling stock, by virtue thereof, came into the possession of said Ward on said August 11, 1873, and he retained possession of the same, and continued to use it in operating the road, up to November 30, 1873, when the same was surrendered; that the rental of said rolling stock was a charge which said company became liable to pay on account of operating the road, and that the same, by the terms of the lease, was to be paid first, out of the earnings of said road; that there were large earnings in the operation of said road by said lessee, which came into his possession, more than sufficient to pay said rent. Plaintiff says that said Eber B. Ward assumed and undertook to pay said rental, and thereby became personally responsible for the same. The petition further alleges the fair rental value of the locomotives, for the time they were used by defendant, to be \$2,424, together with insurance, \$91.80. Plaintiff asks judgment for \$2,424, with interest and costs.

The original notice was served on Orrin W. Potter, in Chicago, Illinois, January 20, 1876. It is agreed that the records of the Circuit Court of Des Moines county show, in the matter of the estate of Eber B. Ward, that O. W. Potter filed his final report and resignation as executor of said estate, on the 28th of May, 1875, but that the resignation was not accepted by an order of the court, until February, 1876.

On the 10th day of March, 1876, no appearance having been made, a default was entered, and judgment was rendered allowing plaintiff's claim to the amount of \$1,629.

On the 12th day of December, 1876, T. C. Owen, S. R.

Mumford, and George H. Wyman, executors, appeared and filed their motion to set aside the default and judgment.

On the 15th day of December, 1876, the resignation of these three remaining executors was accepted, and Orrin W. Potter was appointed administrator *cum testamento annexo*, and was substituted as defendant in the cause.

On the 21st day of February, 1877, the motion to set aside the default and judgment was sustained, to which the plaintiff excepted.

On the 23d day of February, 1877, the defendant filed his answer, which contains a general denial; an averment of want of knowledge or information sufficient to form a belief as to the allegations relating to the transactions between plaintiff and the Burlington and Southwestern Railway Company, set out in petition; an admission that Eber B. Ward entered into a written agreement with the Burlington and Southwestern Railway, of which he supposed the exhibit attached to the petition is a copy; a denial that Ward ever *leased* said railroad, or ever took possession of said property, or controlled or in any way managed the same as *lessee*, or that he ever undertook to pay the rental claimed by plaintiff, or became personally responsible therefor; an averment that Ward faithfully carried out all the duties imposed upon him by said contract, and faithfully applied all the earnings of said road, which came into his hands thereunder, in the manner therein pointed out.

The contract, under which it is claimed E. B. Ward became liable for the rental of the locomotives in question, is attached to the petition, marked Exhibit "B," and is as follows:

"This indenture, made this 11th day of August, 1873, by and between the Burlington and Southwestern Railway Company, a body corporate, holding and operating a line of railroad under and by virtue of the laws of the States of Iowa and Missouri, party of the first part, and Eber B. Ward, of the city of Detroit, in the State of Michigan, party of the second part, witnesseth:

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The United States Rolling Stock Co. v. Potter.

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"That, whereas, the said party of the first part, in building and equipping their said road from Viele, in the State of Iowa, to Stanley City, in the State of Missouri, has incurred certain liabilities to divers and sundry persons, which the said company is unable to pay, and by reason thereof, is unable to complete its road to Stanley City ;

"And, whereas, the said company has issued its bonds to the amount of twenty thousand dollars per mile of its road, which are secured by a first mortgage on said road and its equipments, having twenty-five years to run, which bonds are not saleable, for the reason, as said company believes, that their said road is still unfinished, and not in a condition to earn the interest on said bonds ;

"And, whereas, the holders of the bonds of said company, in order to increase the market value of the bonds held by them and by the company, desire to have the said Ward enter into this arrangement, and, to enable him to do so, have agreed to raise and loan the said Ward, for a term of years, upon securities furnished by him, the sum of seven hundred and fifty thousand dollars (\$750,000) ;

"And, whereas, the said Eber B. Ward, in order to aid the said company to finish their said road to Stanley City aforesaid, the distance of about forty miles, and to put the same in good working order, and pay certain of the obligations of said company, has agreed to lease and finish their said road to Stanley City aforesaid ;—

"Now, therefore, in consideration of the sum of five dollars, to it paid by the said party of the second part, and of the obligations hereinafter entered into by the said Ward, the said party of the first part does hereby grant, demise and lease, unto the said Eber B. Ward, their entire line of railroad, including the unfinished portion thereof, to have and to hold, operate and traffic thereon, with all the rights, immunities, privileges and appurtenances thereunto belonging, with all the real estate, track, rolling stock, depots, offices, tools, apparatus and other things belonging to said company or road, either for



the purpose of constructing or operating the same, together with all the rights and privileges of said company to and with other companies and railroads, for traffic over other roads or otherwise, unto the said party of the second part, for and during the full end and term of five years, commencing on the 11th day of August, 1873, under and subject to the stipulations hereinafter contained.

"And the said Eber B. Ward, on his part, hereby covenants and agrees to and with said railway company, that he will immediately enter upon and take possession of said road; that he will furnish the sum of seven hundred and fifty thousand dollars (\$750,000), to be applied by him to the following purposes, to-wit:

"*First*—To pay for the necessary iron, spikes and joints for the track of said road, from its present terminus to Stanley City, in the State of Missouri, forty miles as estimated, and estimated to cost \$255,000, the said company agreeing that they have now on hand iron sufficient to lay or cover five miles or thereabouts, which the said Ward agrees to lay, making in all about forty miles.

"*Second*—To pay certain construction indebtedness of said company already incurred, and to be incurred, to complete the road to Stanley City, one hundred and fifty thousand dollars (\$150,000).

"*Third*—To pay the notes heretofore indorsed by said Ward for said company, two hundred and forty-five thousand dollars (\$245,000) more or less.

"*Fourth*—When the said road is completed to Stanley City, and the said bondholders shall pay over to said Ward the last one hundred thousand dollars (\$100,000) provided for, the said Ward is to expend the same for rolling stock and equipments for said road.

"*Fifth*—Said Ward shall use and operate said road to the best advantage he may be able, and pay out of the earnings thereof—First, all the running expenses, salaries of officers, taxes, necessary repairs and fences, and all other charges and

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expenses which said company might become liable to pay, on account of operating said road. Second, if, in his judgment, it be advisable, he may pay to the western creditors of said company such sums of money as may be due to them, or such portion of them as may be necessary to enable him to carry out this contract, such sums being first audited and certified by the board of directors of the company or the executive committee, if disputed; and thirdly, the net earnings of the said road shall constitute a sinking fund to repay said Ward the seven hundred and fifty thousand dollars (\$750,000) so advanced by him as above provided for, with interest at the rate of ten per cent per annum, to be paid semi-annually, and in case the road does not earn sufficient to pay its running expenses and interest, then the interest to become principal, and draw interest at the same rate. There shall be included in the current expenses, and be paid to said Ward for his services and commissions, such reasonable sum as shall be mutually agreed upon by the board of directors and said Ward, or by such persons as the same may be referred to by them. It is understood and agreed, that in case the net earnings of said road shall not be sufficient to pay such indebtedness as said Ward shall be obliged to pay for said company, together with the principal sum of seven hundred and fifty thousand dollars (\$750,000) with interest thereon, within five years as provided for in this lease, then the said time shall be extended and continued, and this lease shall be in force upon the same terms and conditions for a sufficient length of time, more or less, to fully complete and pay up the seven hundred and fifty thousand dollars (\$750,000) with interest; or, in case the company, its assigns, or the holders of its bonds, at any time after the completion of said road, as above provided for, shall pay or cause to be paid to the said Ward the full sum of seven hundred and fifty thousand dollars (\$750,000), and interest at ten per cent per annum semi-annually, together with his costs and charges and any liabilities which he may have incurred for said company for any of the purposes herein stated,

then from and after that date this contract shall cease, and the said company shall have the right to enter into and take possession of the said road, and the said Ward shall deliver possession thereof forthwith.

"It is further understood and agreed, that the said party of the first part shall, immediately upon the execution of this instrument, assign, or cause to be assigned, a majority of all the stock of said company to William J. Rotch and E. D. Mandell, of New Bedford, and Elijah Smith, of Boston, Trustees, who are to hold said stock during the continuance of this lease, with a *pro rata* increase, if any stock is hereafter issued by said company, with power to vote upon such stock, and it shall be their duty to vote upon such stock as said Ward shall direct, to the intent that it shall secure the execution of this contract in its original scope and purpose, thereby protecting said Ward in the fulfillment of this contract by said railway company during the continuance of this lease, and at the expiration thereof said trustees shall re-assign said stock to its proper owners. The said Ward shall have full power and authority to nominate and appoint all the officers, attorneys, solicitors and counselors for said company, at such salaries, and upon such terms as in his judgment shall be for the best interest of the company, who, under his direction, shall faithfully carry out the covenants herein contained; said Ward shall be President or Managing Director, as he may choose, during the continuance of this lease, to the end and with the intent and understanding, that said Ward shall have complete and absolute control of said road, until he is fully paid and satisfied of his advances, charges and interest, and upon fulfillment of this lease in good faith by the said company, then his control shall cease, and the said party of the first part further agree to deliver to William W. Crapo, of New Bedford, as trustee, the proposed consolidated bonds of said company, amounting at their par value to the sum of one million of dollars, to be held by him as collateral security for the loan above provided for, and for the fulfillment of

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this contract, and in case the holders of the company's bonds proceed to foreclose the mortgage on the said road, or in case any of the creditors of the company put the road into bankruptcy, the said Eber B. Ward shall, in that case, if he so elect, be the absolute owner of said bonds, to the extent and value of the indebtedness of said company to him at that time. But at any time when the said company, or the holders of its bonds, shall fully pay to said Ward its entire indebtedness to him, he shall thereupon cause the trustees to surrender the said bonds to said company, and this contract shall then cease.

"And it is further agreed, by and between the parties hereto, that in case of the death of said Eber B. Ward, before the complete fulfillment of the terms of this lease, then Samuel P. Burt and William W. Crapo, of New Bedford, Massachusetts, and Tubal C. Owen, of Detroit, Michigan, or the survivors of them, shall constitute a Board of Trustees, and they are hereby appointed as such to act in the place and stead of said Ward, with all the powers and privileges granted to him, to carry out the requirements of this agreement."

Exhibit "A," attached to the petition, is a contract dated May 10, 1873, executed by plaintiff and the Burlington and Southwestern Railway Company, by which plaintiff agrees to furnish said company certain rolling stock, for which said company agrees to pay a rental of eight dollars per each working day, for each locomotive, rent to be calculated to the first day of each calendar month, and paid without deduction or delay, and all premiums of insurance paid by plaintiff to be repaid by said railway company.

The plaintiff offered upon the trial of the cause the following agreed statement of facts:

"It is hereby agreed that the following facts can be proven in this case, subject to all legal objections made on the trial.

1. The Burlington and Southwestern Railway Company entered into the written contract with plaintiff, attached hereto as Exhibit "A," and in accordance with said contract, said

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railway company, on May 10, 1873, received possession of two locomotives and tenders, Nos. 316 and 317, and said rolling stock was used in the operation of said railway from that date until November 30, 1873.

"2. Eber B. Ward in his life-time entered into the contract attached hereto as Exhibit 'B,' but did not take actual control or possession thereof till the 1st day of September, 1873, and did not begin to receive the revenues of said road till that day; that from September 1, 1873, to October 8, 1874, and while said road was being operated under contract (Exhibit 'B'), as hereinbefore stated, it was operated in the name of the Burlington and Southwestern Railway Company, E. B. Ward being President of said company, and exercising such control as such President, as he had the right and power under said contract (Exhibit 'B') to exercise.

"3. The following is a correct statement of account due plaintiff under said contract (Exhibit 'A'), leaving the court to determine from the facts how much thereof, if any, this defendant is liable for:

"Rent, May 10, 1873, to November 30, 1873,	\$2,544 00
"Add insurance                   -           -           -           -	91 80
	<hr/>
	\$2,635 80
"Credit by repairs                   -           -           -	211 74
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	\$2,424 06

"And the use of said rolling stock was reasonably worth the sum above set forth, and said rent was, by contract, due and payable monthly, and should draw six per cent after due, and no part of said claim has been paid.

"4. E. B. Ward, while operating said road, received all its earnings for the purposes and in the manner provided in said contract (Exhibit 'B'), and on the 19th day of October, 1874, in a certain cause then pending in the District Court of Davis county, Iowa, wherein the said Eber B. Ward was plaintiff,

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and the Burlington and Southwestern Railway Company *et al.* were defendants, the court appointed E. McKitterick receiver of said railway, and he at once took possession of said road, and said E. B. Ward turned over to said receiver, at the time of his taking possession, the sum of \$3,897.66. But the outstanding liabilities of said Ward, under said contract (Exhibit 'B'), for the running expenses, salaries of officers, etc., on account of the operating of said road during the control thereof by him, was in excess of said sum of \$3,897.66, at the time said McKitterick took possession of the road, and said sum was all paid out by said McKitterick on pay rolls for operating expenses incurred while said Ward was managing said road. All, or nearly all, of said debts so paid by said McKitterick, were incurred subsequent to the falling due of plaintiff's claim, and the gross earnings of said road, after November 30, 1873, largely exceeded plaintiff's entire claim, and during the receivership of said McKitterick there was a dividend paid to said Ward's estate of \$1,500. This dividend was paid upon a judgment and decree rendered in the aforesaid cause in the Davis county District Court, October 19, 1874, and out of the earnings which accrued after the road passed into the hands of said McKitterick, receiver. Said decree may be considered as in evidence for what it is competent to prove.

"5. E. B. Ward died January 1, 1875, and O. W. Potter, defendant, is the administrator of his estate; administration granted April 12, 1875, in Iowa; first publication of notice April 26, 1875, and plaintiff's claim was filed against said estate November 18, 1875."

The court found that plaintiff was entitled to recover for the reasonable value of the use of plaintiff's property from the 1st day of September to the 30th day of November, 1873, with six per cent interest from the end of each month, and rendered judgment for the plaintiff for the sum of \$1,345.80. Both parties appeal.

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The United States Rolling Stock Co. v. Potter.

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*Blake & Hammack*, for plaintiff.

*H. H. Trimble and E. S. Huston*, for defendant.

DAY, J.—I. The plaintiff appeals from the order of the court setting aside the judgment by default, and permitting a defense. The original executors of the estate of Eber B. Ward were O. W. Potter, Samuel R. Mumford, George H. Wyman, and T. C. Owen, all non-residents of this State, the said Eber B. Ward being, at the time of his death, a resident of the State of Michigan. Administration was granted to these executors in Iowa, pursuant to the provisions of section 2368 of the Code, on the 12th day of April, 1875. O. W. Potter filed his final report and resignation as executor of said estate, in the Circuit Court of Des Moines county, Iowa, on the 28th day of May, 1875. The resignation was not accepted by an order of the court until February 22, 1876. The original notice was served upon Orrin W. Potter, alone, in Chicago, on the 20th day of January, 1876, almost eight months after his resignation was tendered. An executor may refuse to accept the trust, or may create a vacancy by removal from the State. Code, § 2347. We think, also, that he may surrender his trust by resignation, and that, after the lapse of a reasonable time for supplying his place, he ought not to be required, against his will, to take further action in the administration of the estate. In this case there were three executors remaining, who are presumed competent to act. There was, therefore, no necessity for supplying Potter's place. Under the circumstances of this case, after the lapse of so long a time from the tendering of his resignation, we are of opinion that Potter was released from the duty of participating in the settlement of the estate, without any formal order of the acceptance of his resignation. It follows that the service of original notice upon Potter conferred no jurisdiction upon the court, and that for that reason the judgment by default was properly set aside. It is claimed, however, that no affidavit of merits

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was filed, nor did the defendant plead forthwith, nor was the application made at the term at which the default was entered. Code, § 2871. This section does not apply where default has been entered without legal authority. *Boals v. Shules*, 29 Iowa, 507.

II. The plaintiff claims that the contract between Ward and the Burlington and Southwestern Railway Company is a lease; that Ward became the lessee of the company, and became liable for the payment of the operating expenses of the company out of his private means. The contract declares that the 2. CONTRACT :  
construction  
of. Burlington and Southwestern Railway Company, "*does hereby grant, demise and lease, unto the said Eber B. Ward, their entire line of railroad, including the unfinished portion thereof,*" and it further provides that "*said Ward shall be President or Managing Director, as he may choose, during the continuance of this lease.*" But the real nature of the agreement is to be determined from a consideration of all its parts, and not from the above, or like expressions. Considering the contract in this manner, it appears that the bonds of the company were unsalable because the road was unfinished, and not in a condition to earn the interest on the bonds. Ward agreed to furnish to the company the sum of \$750,000, to be expended in the construction of forty additional miles of road, estimated to cost \$255,000; in paying construction indebtedness incurred, and to be incurred, \$150,000; in payment of notes indorsed by Ward for the company, \$245,000; in purchasing rolling stock and equipments, \$100,000. Ward agreed to enter upon and take possession of the road, to use and operate it to the best advantage he might be able, to pay out of the earnings thereof—*First*, all the running expenses, salaries of officers, taxes, necessary repairs, fences, and all other charges and expenses which the company might be liable to pay, on account of operating said road; *second*, he was authorized to pay certain western creditors of the road; *third*, the net earnings of the road were to be applied to the repayment to Ward of the sum of \$750,000, with ten per cent interest, pay-



able semi-annually. It is further provided that there should be included in the current expenses, and be paid to Ward, for his services and commissions, such reasonable sum as might be mutually agreed upon. It is further provided, that in case the net earnings of the road shall not be sufficient within five years to pay such indebtedness as Ward shall be obliged to pay for the company, together with the principal sum of \$750,000, with interest thereon, then the time shall be extended for a sufficient length of time to fully pay up the \$750,000, with interest; and that in case the company, its assigns, or the holders of its bonds, at any time after the completion of the road, shall pay to said Ward the sum of \$750,000, and interest at ten per cent per annum, semi-annually, together with his costs, charges, and any liabilities which he may have incurred for said company, then this contract shall cease; and that said Ward shall be President or Managing Director, as he may choose, during the continuance of this lease, to the end and with the intent that Ward shall have complete control of said road, until he is fully satisfied of his advances, charges and interest. It is quite apparent, we think, from these provisions, that Ward was constituted the agent or trustee of the company, to manage the road for the benefit of the company, and apply the net earnings to the payment of his advances. It appears, also, from the agreed statement of facts that, "while said road was being operated under contract (Exhibit "B"), as hereinbefore stated, it was operated in the name of the Burlington and Southwestern Railroad Company, E. B. Ward being President of said company, and exercising such control as such President as he had the right and power under said contract to exercise. Operating the road thus in the name of the company, accounting for the net earnings, and paid for his services, Ward can in no proper sense be regarded as a lessee of the road, liable to answer for the contracts of the company out of his private means.

It is to be observed that the locomotives, for the use of which plaintiff sues, were leased to the Burlington and South-

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The United States Rolling Stock Co. v. Potter.

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western Railway Company on the 10th day of May, 1873, three months before Ward entered into his contract with said railway company. Plaintiff, at the time its contract was made, could only look to the railway company for performance. Ward's contract with the railway company did not diminish the means of payment out of the company's earnings. Upon the contrary, by furnishing the means for the completion of the road, it tended to increase its earnings and enhance the means of payment. It is not shown that Ward failed in any respect to fully and fairly account for the earnings of the road.

On the 19th day of October, 1874, E. McKitterick took possession of the road as receiver. At that time Ward turned over to the receiver the sum of \$3,897.66. The outstanding liabilities of Ward, under said contract, for running expenses, salaries of officers, etc., were at that time in excess of said sum, and McKitterick paid it all out on pay rolls, for operating expenses incurred while Ward managed the road. If Ward had paid plaintiff's claim, there would have been a less sum to turn over to the receiver, and other operating expenses must have remained unpaid.

Ward did not hire the locomotives, nor did he personally have the benefit of their use. Indirectly he might have been benefited, if the road had earned enough to apply anything upon the principal or the interest of his advances. But the record does not show that anything was so applied during the time he operated the road. The Burlington and Southwestern Railway Company hired the locomotives, and had the benefits of their use in the earnings of the road.

It appears that during the receivership, and after Ward's death, there was a dividend paid to Ward's estate of \$1,500. This dividend was paid out of earnings which accrued after the road passed into the hands of the receiver. Ward's estate was a creditor of the railroad company, and it cannot be held liable to this plaintiff, because a part of the debt due the estate has been paid. If Ward, whilst he managed the

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 Holden v. Stranahan.
 

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road, had applied to the payment of himself this \$1,500, leaving the operating expenses unpaid, he would, to that extent, probably, have been liable.

It seems quite clear, however, that under the agreed statement of facts the estate of Ward cannot be held liable for the rent of the locomotives in question.

REVERSED.

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 HOLDEN V. STRANAHAN.

1. **Execution: EXEMPTION.** The building in which a photographer carries on his business, even though it be personal property, is not exempt from execution under section 3172 of the Code.

*Appeal from Keokuk Circuit Court.*

WEDNESDAY, APRIL 3.

THE defendant, as sheriff, under an execution against the plaintiff levied on and took possession of a building owned by plaintiff in which he carried on his trade or business of photographing, and this action was brought to recover possession of said building.

There was a trial by the court, a finding of facts, and judgment for the defendant.

The plaintiff appeals.

*Farley & Kelley*, for appellant.

*Woodin & McJunkin*, for appellee.

SEEVERS, J.—I. Under the finding of facts, the building in question is conceded to be personal property. It is further found that plaintiff is a photographer and mechanic; that he used and occupied said building for the purpose of carrying

1. **EXECUTION:** exemption. on his business therein, and that he thereby habit-

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Holden v. Stranahan.

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ually earned his living. The question presented is, whether the building is exempt from execution under section 3072 of the Code, which exempts "the proper tools, instruments, or books of the debtor, if a farmer, mechanic, surveyor, clergyman, lawyer, physician, teacher, or professor." It will hardly be claimed, we think, that the building in which the blacksmith, shoemaker, or carpenter may carry on his business would be exempt. Nor would the building erected by the farmer on leasehold premises, in which he lived with his family, and which, by the terms of the lease, he could remove therefrom, be exempt; and yet he must have some place which he and his family could occupy. The needs of the photographer, in this respect, are no greater than his, or those of the blacksmith or carpenter. It is not found as a fact, by the court, that the plaintiff could not carry on his business in any other building, or that the proper pursuit thereof required a building constructed in a peculiar manner, and we cannot know, judicially, that such is the case. Therefore, the plaintiff stands on the same plane as any other mechanic, and the terms "tools" or "instruments" have not, we think, any such broad and practically unlimited meaning. The statute means the tools or instruments used or handled by the mechanic, and does not include the building or place where the trade is pursued.

II. The action brought by the plaintiff being replevin, the court rendered a judgment against him and the sureties on his bond for the value of the property. It is claimed this is erroneous, because the plaintiff and surety offered to return the property. What effect an offer to return the property might have we are not required to determine, because we find no evidence of such offer having been made in the abstract. It is so claimed in the argument of counsel, but of course we cannot receive such a statement as evidence of a fact.

**AFFIRMED.**

## McDONALD V. JOHNSON ET AL.

- 1. Judicial Sale: FRAUDULENT MORTGAGE.** Where a fraudulent mortgage had been executed to defraud the creditors of the mortgagor, and the land embraced therein was sold under an execution to satisfy a judgment, the mortgage being treated in the appraisement and sale as a valid one, it was *held*, that the mortgagees could not, after the mortgage had been decreed fraudulent, maintain an action to set aside the sheriff's sale.

*Appeal from Poweshiek Circuit Court.*

WEDNESDAY, APRIL 3.

THE petition in substance alleges that on June 17, 1875, an execution issued from the Poweshiek Circuit Court, upon a judgment wherein W. J. Johnson is plaintiff, and W. H. McDonald and Henry McDonald are defendants, for the amount of \$40.50, with interest and costs, and that under said execution the sheriff, by his deputy, levied upon a certain described forty acres of land; that said deputy sheriff failed to post written or printed notices of the time and place of sale, in the manner provided; that said deputy sheriff served notice on defendant in execution, W. H. McDonald, that on Saturday, September 4, 1875, at one o'clock P. M., he would sell said real estate at the door of the court house in said county; that on August 4, 1875, the deputy sheriff appointed P. P. Raymond and W. A. Vernon to appraise the said land, who appraised the value of the same to be \$600; that the said deputy sheriff, or Clark Varnum, Esq., attorney, discharged the same, and said deputy appointed other appraisers, to-wit: J. M. Hastings and Arthur Shifflet, who, acting under the directions and instructions of said attorney, made return, fixing the value of said land at one dollar, when the land was well worth the sum of \$800; that on September 4, 1875, at the front door of the postoffice in Malcolm, a place unusual, not

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McDonald v. Johnson.

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fixed by law, nor named in the notice served upon the execution defendant, the deputy sheriff sold said land to W. J. Johnson for \$19.30—a price grossly inadequate, and which only covered the cost of the sale; that on the 18th day of October, 1875, said W. H. McDonald, and this plaintiff, offered to pay the amount of said judgment, interest and costs, and one hundred dollars to Johnson's attorney, which was refused; that on the 19th day of October, 1875, plaintiff tendered to the said W. J. Johnson the sum of \$57.15, the full amount of judgment, interest and costs, and \$19.30 sheriff's costs, which was refused, and which amount plaintiff brings into court for the use of those entitled to it; that on the 18th day of October, 1875, Phebe McDonald, this plaintiff, the mother of W. H. McDonald, bought the land of W. H. McDonald, and all his right and interest therein, and is the owner thereof.

Plaintiff asks that the sale may be declared fraudulent and void, and be set aside, and that defendant be compelled to accept the amount tendered, and satisfy the judgment and costs.

An injunction restraining the sale of the property was asked and was allowed, but no bond was filed, and no writ of injunction was issued.

The defendants, for answer, admit the judgment, issuance of execution and sale of the land; deny that the sheriff served notice that he would sell the land at the door of the court house in Montezuma, and allege that notice was duly served upon W. H. McDonald that the land would be sold at the door of the postoffice in Malcolm, and that McDonald was present at the time of sale; deny that the sheriff appointed any appraisers except those who appraised the land; deny that the sheriff or Clark Varnum destroyed any appraisement, or committed any fraud; deny that the land was worth \$800, and aver that it was not worth over \$500, and that it was incumbered to upwards of \$1,300, all of which, as appeared from the county records, was senior and paramount to the lien of the judgment of *W. J. Johnson v. W. H. Mc-*

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McDonald v. Johnson.

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*Donald and W. M. McDonald*; admit that the appraisers appraised the land at the sum of one dollar, and allege that said sum was in excess of its value, subject to the incumbrances, which were senior to W. J. Johnson's judgment; admit that, at the front door of the postoffice in Malcolm, the land was sold to W. J. Johnson for \$19.30, which was a sum largely in excess of the full value of the land, subject to the liens and incumbrances which were prior to Johnson's judgment; deny that the place of sale was unusual, not fixed by law, nor named in the notice of sale served on the execution defendant; aver that the sheriff executed to Johnson a deed for the land in the usual form, and that said land had been sold by the said Johnson to one J. Weaver, prior to the commencement of this action, and that none of the defendants have any interest in said real estate.

The defendants, by way of cross-petition, allege that on the 18th day of December, 1869, the plaintiff and W. H. McDonald, execution defendant in the execution referred to in plaintiff's petition, entered into a conspiracy and agreement to cheat, defraud and delay the then existing creditors of W. H. McDonald, of whom W. J. Johnson was one; that in pursuance of said fraudulent agreement, on said day, W. H. McDonald executed to plaintiff his promissory notes for two thousand dollars, and secured the same by a mortgage on the land on which the defendant Johnson's execution was levied; that immediately after the levy of the execution upon the land in controversy, the plaintiff, still pursuing her intention and agreement to defraud the creditors of W. H. McDonald, commenced her action to foreclose said fraudulent mortgage; that W. J. Johnson was made a party defendant to said action for the purpose of defeating his lien on said land; that Johnson appeared and answered in said cause and pleaded the fraud in the mortgage and notes, and a trial was had in the District Court of Poweshiek county and the said mortgage of plaintiff was decreed to be fraudulent and void, and a decree was rendered in said court in favor of said Johnson, dismissing

## McDonald v. Johnson.

plaintiff's petition; that said plaintiff, having failed to foreclose and defeat the lien and title of W. J. Johnson, has commenced this action to defeat in this court what she could not defeat in the District Court; that plaintiff's pretended deed, if any there be, was obtained subsequent to the sheriff's sale, and with full knowledge of the manner of conducting the sale, and was obtained without consideration in pursuance of the fraudulent agreement entered into between plaintiff and W. H. McDonald. The defendants ask that the sheriff's sale may be decreed to be regular and valid. No reply was filed to this cross-petition. The court decreed the sale and sheriff's deed to be void, and adjudged that defendant Johnson is entitled to the sum of \$76.45, the money deposited with the clerk for his use.

The defendants appeal.

*Clark Varnum*, for appellants.

*Ballard & McCready*, for appellee.

DAY, J.—The land in controversy is the northwest quarter of the northwest quarter of section thirteen, township eighty, range fifteen.

On the 18th day of December, 1869, W. H. McDonald executed to his mother, the plaintiff, a mortgage upon this land, and also upon the northeast quarter of the northwest quarter of the same section, township and range, to secure four promissory notes, each for the sum of \$500.

1. JUDICIAL  
sale: fraudulent mortgage.

On the 4th day of January, 1873, W. J. Johnson recovered a judgment against W. H. McDonald and Henry McDonald for the sum of \$40.50, with interest at ten per cent and costs.

On the 17th day of June, 1875, execution was duly issued upon this judgment, and on the 2d day of August, 1875, it was levied upon the land in controversy. At the time of this levy the mortgage above named was upon record, and there



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was apparently due thereon about \$2,400. There were other liens upon said land, prior to Johnson's judgment, amounting to about \$100.

The other forty covered by the mortgage was W. H. McDonald's homestead. McDonald was notified to select an appraiser for the land, but neglected to do so. The deputy sheriff, who had the execution in hand, thereupon appointed W. A. Vernon and P. P. Raymond to appraise the land. A statement was furnished to them showing the amount of incumbrances upon the land. They refused to consider the incumbrances, and appraised the land at \$600, which is shown to be about its actual cash value. The deputy sheriff, acting under the advice and direction of Clark Varnum, Esq., the attorney of Johnson, disregarded this appraisement, and other appraisers were selected who appraised the land, subject to the incumbrances, at one dollar.

Before the sale, to-wit: on the 20th day of August, 1875, Phebe McDonald commenced an action against W. H. McDonald on the notes and mortgage, making W. J. Johnson a party defendant, asking a judgment against W. H. McDonald for \$2,400, and that the lien of her mortgage be declared superior to that of Johnson's judgment.

On the 4th day of September, 1875, the land in controversy was sold at sheriff's sale to Johnson, for \$19.30.

At the October Term, 1875, Johnson answered in the foreclosure suit, alleging that the notes and mortgage were wholly without consideration, and were made for the purpose of hindering, delaying and defrauding the creditors of W. H. McDonald.

On the 7th day of October, 1875, the Poweshiek District Court entered a decree in said cause, finding the allegations in the answer of Johnson to be true, and dismissing plaintiff's petition in so far as it sought a foreclosure of the mortgage upon the land in controversy.

Phebe McDonald recovered judgment against W. H. McDonald, on the notes, and in settlement of that, he deeded to

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McDonald v. Johnson.

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her the land in controversy. Thereupon the plaintiff brought this action to set aside the sheriff's sale.

It is claimed that the appraisement was irregular, and that the sale was for a grossly inadequate sum. The real cash value of the land, at the time of the sale, without reference to incumbrances, is shown to have been about \$600. This land, in connection with another forty, was covered by a mortgage, which, including interest, amounted to about \$2,400. The other forty was the homestead of the mortgagor, so that the forty in question was primarily liable for the whole debt. It was subject to an incumbrance of record, and which to all appearance was valid, amounting to four times its value. The value of the land, subject to the incumbrance, was nothing. If the sheriff had sold the land under the first appraisement, he would have been authorized to sell it for such sum as, added to the prior incumbrances, would amount to two-thirds the value of the property, as ascertained by the appraisement. *Sargent v. Pittman*, 16 Iowa, 469. The land sold for much more than that. It becomes immaterial to inquire into the validity of the second appraisement, for it is apparent that the execution defendant sustained no prejudice therefrom. The difficulty under which the plaintiff and the execution defendant labor, arises from the fact of their placing upon record a fraudulent mortgage upon the land, amounting to much more than its value. Purchasers at the sheriff's sale had a right to regard this mortgage as a valid lien. *Barber v. Tryon & Pierce*, 41 Iowa, 349. In fact the evidence shows that plaintiff and the execution defendant were both present at the sale, and that plaintiff warned every one present that whoever bought the land must discharge her mortgage before he could get a deed. The marketable value of the land was depreciated, because of the mortgage which plaintiff and the execution defendant placed upon the land. If the mortgage had been valid, it cannot be questioned that the land sold for more than it was worth. But now that the mortgage has been declared fraudulent, plaintiff seeks to

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 Hiatt v. Kirkpatrick.
 

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avail herself of that fact, and to set aside the sheriff's sale, because the land sold for an inadequate price. A court of equity will not permit her to make this claim for this purpose. So far as this sale is concerned, this mortgage must be considered what it appeared to be at the time of the sale, a valid lien upon the property sold.

The other allegations of the petition are not sustained by the proof. The execution defendant was notified that the sale would occur at the door of the postoffice in Malcolm.

II. There is a further insuperable objection to the sustaining of the decree of the court below. The evidence shows that the land in controversy was sold to J. Weaver before this action was commenced. He has not been made a party to this suit.

The petition of plaintiff should have been dismissed.

REVERSED.

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#### HIATT V. KIRKPATRICK ET AL.

1. **Adverse Possession: STATUTE OF LIMITATIONS.** Where the grantors of plaintiff and defendant had established a division line between them, irrespective of the line established by government, which line had been maintained for more than ten years, *held*, that the possession beyond the government line was adverse, and protected by the statute of limitations.

*Appeal from Mahaska Circuit Court.*

WEDNESDAY, APRIL 3.

**ACTION to recover a strip of land in the southwest quarter of section 31, township 77, range 15.** The plaintiff claims to own the southeast quarter of the quarter section, and the defendants the southwest quarter of the quarter section, and to a fence parallel to and standing about five rods east of the east line of the last described forty. The question is as to

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48	78
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## Hiatt v. Kirkpatrick.

whether the fence is the division line between the parties. The quarter section is fractional. According to government survey, the east eighty is full, and of course the southeast quarter of the quarter section is full. What is denominated as the west eighty is made to sustain all the deficiency. The fence is built upon the middle line between the east and west lines of the quarter section. The strip in controversy is that part of the southeast quarter of the quarter section which lies west of the fence. The plaintiff's claim is based upon a line of conveyances from the original source of title, purporting to convey the whole forty. The defendants' claim is based upon an alleged agreement and occupancy. The court below held that the government line between the two forties should be regarded as the division line between the parties, and rendered judgment for the plaintiff. The defendants appeal.

*John F. Lacey*, for appellants.

*Lafferty & Johnson*, for appellees.

ADAMS, J.—The east eighty was originally purchased by one Benjamin Kirkpatrick of the School Fund Commissioner. He assigned his contract to the plaintiff's grantors, Samuel and Isaac Varney, to whom a patent was issued by the Governor of Iowa in 1855. The west eighty was purchased of the School Fund Commissioner by one Samuel Kirkpatrick, the defendants' ancestor, under whom they derive title. A patent was issued to him by the Governor of Iowa in 1858. The two Kirkpatricks were brothers. Each, before his purchase, occupied the land as a claimant. Each, indeed, bought out a prior claimant. Benjamin bought out one Clark, and Samuel one Hamilton. Clark and Hamilton had made an equal division of the quarter section between them, established a line, and occupied accordingly. Benjamin and Samuel Kirkpatrick recognized the line as the division line, and occupied accordingly. Those holding under

1. ADVERSE  
possession:  
statute of limi-  
tations.

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Hiatt v. Kirkpatrick.

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them, including the plaintiff and defendants, recognized the line as the division line, and occupied accordingly. A short time, however, before the commencement of this action, the plaintiff discovered that the line which had been recognized as the division line was about five rods east of the government line, and he now insists that he is entitled to hold to that line. The defendants claim the strip in controversy by adverse possession.

In *Brown v. Cockerell*, 33 Ala., 45, it was held, that "if a party occupy up to a certain fence because he believes it to be his line, but having no intention to claim up to the fence if it should be beyond the line, an indispensable element to adverse possession is wanting." In *Grube v. Wells*, 34 Iowa, 148, it was held that where the defendant's claim was limited to a lot of a certain number, but his possession extended to and covered a part of an adjacent lot embraced in his inclosure, this did not amount to an adverse possession in the latter. In both these cases it will be observed that the claim of right was not absolute but conditional. In the case at bar, however, a line was established absolutely. It was in no sense conditional or provisional. The Kirkpatricks, it appears, knew that the quarter section was fractional. They must, therefore, be presumed to have known that the government line was some five rods west of the line which they agreed upon. They never intended to respect the government line, for they purchased of Clark and Hamilton respectively, and with reference to a division line which they had established, irrespective of the government line. The defendants then, and those under whom they hold, occupied the land in controversy under an absolute claim. Had they so occupied it for ten years prior to the commencement of the action? We think they had. Prior to 1856 a fence had been built upon the line, which had been agreed upon as the division line. In that year the plaintiff purchased. By agreement between the plaintiff and Samuel Kirkpatrick, who then owned the west eighty, a lane was made between them for a stock road, each

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 Saunders v. Halliday.
 

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party giving about ten feet for the lane. About ten years afterward the lane was discontinued, and the fence replaced upon the old line. In our opinion, the statute did not cease to run during the maintenance of the lane, even in regard to that part which Samuel Kirkpatrick threw out as a contribution to the lane. It was thrown out for his own use and occupancy, and was occupied by him as essentially as before. We are of the opinion that the plaintiff is barred by the statute of limitations, and the judgment of the Circuit Court must be

REVERSED.

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SAUNDERS V. HALLIDAY ET AL.

**1. Practice in the Supreme Court: TRIAL DE NOVO.** In the absence of a motion and order that the case be tried upon written evidence, an express agreement must be shown that it be so tried to entitle the parties to a trial *de novo* on appeal.

*Appeal from Winneshiek District Court.*

WEDNESDAY, APRIL 3.

ACTION in equity to subject certain premises to the payment of a claim held by the plaintiff against the defendant, Halliday. Decree for defendants. Plaintiff appeals.

*Willett, Wellington, & Willett*, for appellant.

*Adams & Bulis*, for appellees.

ADAMS, J.—The plaintiff has not assigned errors, and claims that the action is triable *de novo*. The action was tried below upon written evidence, and the evidence is all before us. There was, however, neither motion nor order in the court below that the action should be tried upon written

1. PRACTICE in  
the supreme  
court: trial de  
novo.

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evidence. Such being the fact, the action is not, we think, triable *de novo* in this court. The appellant insists that the action was tried upon written evidence by agreement, and that it is, therefore, triable *de novo* under the rule held in *Van Bogart v. Van Bogart*, 46 Iowa, 359. But the abstract fails to show anything more than the mere fact that it was tried upon written evidence. We think that an agreement which should be sufficient to supersede the necessity for a motion and order should be an express agreement. Parties are entitled to know, at the appearance term, whether the action is to be triable *de novo* in this court or not, that they may govern themselves accordingly. If neither motion nor order nor express agreement is made for a trial upon written evidence, either party has a right to assume that the action will not be triable *de novo* in this court, whether the evidence is taken at the trial below in writing or not. This case not being so triable, and there being no assignment of errors, the judgment of the court below must be

AFFIRMED.

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SCHOONOVER V. HINCKLEY.

1. **Receiver: CORPORATION.** In an action by a receiver to recover from a stockholder an assessment upon his unpaid stock, the latter cannot set up, as a defense, fraud in procuring the appointment of the receiver, or the claim that the corporation is not indebted, these matters being adjudicated in the action resulting in the appointment of the receiver.

*Appeal from Johnson District Court.*

WEDNESDAY, APRIL 3.

**ACTION** by the receiver of the Iowa and Minnesota Construction Company, to recover of defendant, a stockholder, assessments made upon his stock. The defendant filed an answer setting up divers defenses, some of an equitable char-

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acter. To the answer a demurrer was sustained, and defendant appealed from this ruling. Other facts appear in the opinion.

*Boal & Jackson*, for appellant.

*Remley & Swisher*, for appellee.

BECK, J.—I. The petition alleges that defendant is a subscriber to the stock of the Iowa and Minnesota Construction Company, to the amount of \$20,000; that an assessment upon defendant's stock was duly made July 22, 1871, for the amount of ten per cent thereof; that plaintiff was duly appointed receiver of the corporation by the Circuit Court of Jones county; that plaintiff was ordered by the court appointing him receiver to make another assessment of ten per cent upon the stock of the corporation which, on the 16th day of June, 1876, he did under direction of the court, and that plaintiff has been ordered by the court appointing him receiver to collect the unpaid assessments upon the stock, for the payment of the debts of the corporation.

II. The answer of defendant sets up certain payments upon the subscription for stock made by him. It further denies that the assessments were legally made, or that assessments can be legally made, except when necessary. The defendant then alleges that the money due on his stock is claimed by another stockholder, J. S. Stacy, for advances made, which, however, defendant avers do not exceed the advances made by him. The answer proceeds in the following language:

"And for further answer, defendant says that the property and railroad line of said construction company was afterwards, by J. S. Stacy, who was the president of the railroad company which let the work to the construction company, sold out, and a large sum of money received therefor, to wit, about \$10,000, which moneys went into the hands of said



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Stacy and Wallworth, and no part thereof to defendant ; that no account thereof has been rendered defendant or said construction company ; that, as defendant is informed and believes, the only claim now made against this defendant, and for which said Schoonover, as receiver, sues this defendant, is a claim by and in behalf of said Stacy and Wallworth ; that said firm of Stacy & Wallworth was composed of J. S. Stacy, the subscriber of twenty shares of said construction stock, and one J. D. Wallworth, of Anamosa, who, for the sole purpose of harassing the stockholders unjustly, made an assignment of the moneys advanced by J. S. Stacy as a stock subscriber on his stock, as if it were a claim of Stacy and Wallworth, separate and apart from J. S. Stacy, to one Shaw, and thereupon, through said assignee and their own co-operation, with a view to gain an unfair advantage over this defendant and avoid the effect of said advances, as payments by Stacy, procured said Schoonover to be appointed as receiver, and so fraudulently to appear as creditors of said construction company, and harass defendant, and collect moneys not due from him, and so to defeat any claims for advances made him ; that with that view said receiver brings this action, based solely upon assessments charged to have been made, concealing or withholding any statement of the indebtedness to be paid thereby ; whereas, in truth and in fact, as defendant charges, no just indebtedness in any amount, or any amount such as claimed from defendant, exists ; that in the proceeding of appointing, or procuring the appointment of a receiver, the defendant was in no sense a party, and especially so as to bind him upon his subscription, and this is his first opportunity to present his rights thereunder. And defendant avers that if the truth were brought before this court it would appear that this action against defendant is oppressive, unnecessary, and unjust, and nothing is due from him, and no really existing claims, at least of any considerable amount, against said company ; that the real party in interest in this cause is J. S. Stacy, and said plaintiff Schoonover a nominal party

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only; that defendant cannot fully adjudicate and determine his rights unless Stacy and Wallworth, J. S. Stacy and J. D. Wallworth, and said Shaw, be made parties defendant to this suit, and this amended answer treated as a cross-bill, and full answer under oath made, together with the pretended indebtedness of said construction company set out in full and duly itemized; that in addition to the moneys received from a sale of the properties of said company, this defendant avers that said Stacy has received from various sources, stock subscription,—the assets of the company, as defendant believes,—not less than \$10,000, and has not yet accounted therefor; that the same should, by reason of the averments aforesaid, go in extinguishment of any and all claims made against defendant and other stockholders, and that any residue, if there be any, be divided to said stockholders, and all of them; that the defendant is advised and believes that the receiver is bringing suits against other stockholders upon the pretended assessments, all for the purpose of paying said indebtedness, pretended to be the claims of Stacy & Wallworth, but in fact the property of said Stacy, all of which said actions, and especially this one, is and are grossly inequitable and oppressive.”

The defenses set up are claimed to be equitable in their character, and the answer is made a cross-bill, and relief is prayed thereon. Plaintiff demurred to defendant's answer, and the demurrer was sustained, except as to the payments pleaded. The correctness of the court's ruling upon the demurrer is the only question involved in this appeal.

III. It will be observed that the matters set up in the answer are such as fraud in procuring the appointment of

1. RECEIVER: the receiver, the claim that the corporation is not  
corporation. indebted, and that the action is prosecuted to enable Stacy to defraud and oppress defendant, etc., etc. These matters, it will be noticed, bring in question the action of the court appointing the receiver, and ordering the assessments. They were proper matters to be determined when these orders were made,

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and must, therefore, be regarded as *res adjudicata*. The defendant can interpose, in the action wherein the receiver was appointed, and his rights and interest will therein be fully protected. The controversy, as set out in the answer, involves matters within the jurisdiction of the court appointing the receiver, which may be determined in that proceeding. That court has adjudged that there is indebtedness of the corporation, and that defendant ought to be assessed as a stockholder. Defendant's answer denies the indebtedness of the corporation and that he ought to be assessed. It will be seen that this defense ought to be made in the proceedings wherein the receiver was appointed.

Our conclusion in this case is in harmony with, and supported by, *Stewart v. Lay*, 45 Iowa, 604.

The demurrer was properly sustained.

**AFFIRMED.**

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ENIX V. HAYS.

1. **Partnership: PROMISSORY NOTE.** Defendant purchased certain cattle of plaintiff, supposing that they were the property of plaintiff and E. as copartners. At the request of E., he subsequently took up a note signed both by E. and plaintiff as makers, although, in fact, plaintiff was but a surety. As a matter of fact, there was no copartnership existing between E. and plaintiff. In an action for the purchase price of the cattle it was *held*:

1. That E. and plaintiff were not bound to join in an action for the purchase price of the cattle.
2. That the defendant should have made inquiry whether in fact plaintiff was principal on the note.
3. That, there being no partnership in fact, defendant could not set off his payment of the debt of E. against the claim of plaintiff.

*Appeal from Monroe Circuit Court.*

WEDNESDAY, APRIL 3.

THIS action was brought to recover \$1,175 for certain cattle which plaintiff averred he had sold to the defendant.

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Enix v. Hays.

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The defendant denied that he had purchased said cattle from the plaintiff. He alleged that the plaintiff and one Pleasant Enix were equal partners in the ownership of the cattle, and that the sale was made from plaintiff and said Pleasant Enix, to defendant, as a partnership transaction, and that he had paid the partnership the full contract price.

Defendant further averred that the plaintiff and said Pleasant Enix were indebted to the First National Bank of Leon, on a promissory note executed by Pleasant Enix, John Enix (plaintiff herein) and one John B. Evans, for over \$1,600; that at the special instance and request of said Pleasant Enix, on the part of himself and plaintiff (who were the principal makers of said note), defendant paid off and took up said note from said bank for the said Pleasant Enix and the plaintiff. The payment of this note is averred to be the purchase price of said cattle. This payment is also pleaded as a set-off against the claim made in the petition.

A jury was waived, and the cause was tried by the court. There was a special finding of facts by the court, of which, so far as is deemed material to this appeal, the following is the substance:

I. In the spring of 1875, the plaintiff and Pleasant Enix owned, each in his own right, certain cattle, which they were herding on the open prairie in Decatur county. The defendant had certain other cattle, and it was arranged that those belonging to all the parties should be herded together. The plaintiff and said Pleasant Enix always spoke of and talked about said cattle to defendant as their cattle, and the defendant supposed, and had good reason to believe, from his conversations with plaintiff and Pleasant Enix, that they owned the same in partnership. Afterwards the defendant, with the knowledge of Pleasant Enix, purchased certain cattle of the plaintiff, the price of which is now in controversy. As a matter of fact, the plaintiff was the sole owner of the cattle purchased by defendant.

II. Pleasant Enix was indebted to the First National

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Enix v. Hays.

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Bank of Leon in the sum of about \$1,600, which debt was evidenced by a note signed by said Pleasant Enix, John Enix (the plaintiff herein), and one Evans as makers, but the plaintiff and Evans were sureties on said note. At the instance and request of Pleasant Enix, the defendant paid off said note, took it up, and subsequently delivered it to said Pleasant Enix, believing, at the time, that his debt for the cattle was owing to plaintiff and Pleasant Enix as copartners, and which, from their conduct with reference thereto, he had the right to believe.

III. By proper inquiry, the defendant would readily have ascertained that the debt to the bank was the individual debt of Pleasant Enix, and he ought to have so known from the circumstances under which it was paid.

IV. There was a partnership existing between defendant and said Pleasant Enix, in feeding, buying and selling cattle and hogs, and upon a settlement of said co-partnership, including said note paid to the bank, but excluding the price of the cattle purchased from plaintiff by defendant, the said Pleasant Enix will owe the defendant an amount greater than the price of the cattle.

Upon these facts, the court found that the defendant was entitled to set off, of the amount due him from Pleasant Enix, a sum equal to one-half the purchase price of the cattle. Both parties excepted to this conclusion of law, and both appeal.

*Dashiell & Andrews and E. W. Haskett, for plaintiff.*

*Perry & Townsend, for defendant.*

ROTHROCK, CH. J.—I. It is urged that the findings of fact are inconsistent with the pleadings. The record does not contain the evidence. Both parties concede that the facts found are true. They must have been established by evidence and we must presume, in the absence of a showing to the contrary, that no objection was made to the evidence,

## Enix v. Hays.

and that the parties submitted the cause upon evidence tending to establish the facts found.

We will, therefore, determine the case as it was presented to the court below.

II. The defendant claims that there should be no recovery against him, because as to him the plaintiff and Pleasant Enix were partners in the ownership and sale of the cattle, and the action should have been brought by them as partners.

1. PARTNER-SHIP : promissory note.

The ready answer to this position is, that they were not in fact partners, and, while the defendant may have the right in making his defense to treat his purchase as a partnership transaction, he cannot claim that the parties to the supposed partnership shall join in the action as plaintiffs.

III. It is further urged by defendant that he was not bound to make inquiry whether plaintiff was principal or surety on the note held by the bank, but had the right to regard both the plaintiff and Pleasant Enix as principals. We think this position is not sound. The fact that the note was signed by the plaintiff, as a maker, cannot be claimed by defendant as a representation that plaintiff was a principal. Further than this, the court found that the defendant ought to have known that the note was the individual debt of Pleasant Enix, "from the circumstances under which it was paid."

The mere fact that the name appeared to the note as maker did not warrant plaintiff in assuming that he was a principal. He should have made inquiry.

IV. The plaintiff insists that the judgment should have been for the whole of the purchase price of the cattle.

The court found that, from the representations made by plaintiff and Pleasant Enix, the defendant had the right to hold them as partners. Whether as equal partners, each entitled to one-half of the proceeds of the cattle after the payment of the partnership debts, does not appear. In our

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Titler v. Iowa County.

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judgment, however, the interest of Pleasant Enix is immaterial, because there was no partnership in fact.

The cattle were owned by the plaintiff, in his own right. The defendant sought to discharge what as to him was a debt due from him to a partnership by a debt owing by one of the partners to him. To do this, he must show the extent of the interest of the debtor partner in the partnership property. It is not sufficient that he show generally that the parties held themselves out as partners. The interest of each partner in the partnership effects is his share of the surplus which may remain after satisfying the partnership creditors, and that share of the surplus only is liable for the separate debts of such partners. 8 Peters, 271.

If the defendant had in good faith paid the price of the cattle to Pleasant Enix, the plaintiff would be in no position to complain, for he led the defendant to believe that the cattle were partnership property; but when the defendant seeks to set off the individual debt of one of the partners, the question is, what share or interest in fact has the debtor partner in the partnership effects? Pleasant Enix had no interest in fact in the cattle, nor in the proceeds of the sale, to which defendant's claim against him could be applied.

REVERSED ON PLAINTIFF'S APPEAL.

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TITLER V. IOWA COUNTY.

1. **Bridges: EVIDENCE.** In an action against a county for injuries received by the falling of a bridge, the records of the board of supervisors are not admissible to show that they appropriated money for repairing or reconstructing the bridge.
2. —: **LIABILITY OF COUNTY.** To establish the liability of the county, it must be shown that prior to the accident the county had assumed control of the bridge, or made appropriations for building or keeping it in repair.

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Titler v. Iowa County.

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*Appeal from Iowa District Court.*

WEDNESDAY, APRIL 3.

AN action to recover for injuries to the person and property of plaintiff, sustained by the falling of a bridge while he was crossing it. After plaintiff had submitted his testimony at the trial the cause was withdrawn from the jury, on the ground that plaintiff had offered no testimony tending to support his cause of action, and judgment was rendered against him for costs, from which he appeals. Other facts of the case appear in the opinion.

*D. H. Wilson and Hedges & Alverson*, for appellant.

*Rumple & Lake*, for appellee.

BECK, J.—I. The plaintiff offered in evidence a record made in the minute book of the supervisors, showing an appropriation for material used in repairing or reconstructing the bridge, after the injuries for which plaintiff sues were sustained; an objection to its admission was sustained. This ruling is assigned as error. We think it correct. Defendant cannot be made liable on the ground that it rebuilt the bridge. Its liability depends upon its relation to the bridge which fell, not to a new one. The point demands no further attention.

II. The plaintiff insists that the record of appropriations by the county, for the purpose of building the bridge which fell while plaintiff was crossing it, was admitted in evidence. The amended abstract, filed by defendant, shows that this testimony was rejected. The plaintiff does not deny the correctness of the amended abstract, but argues that it, taken with the original abstract, shows that the testimony was admitted. We cannot concur in this conclusion. We think the testimony was rejected. It is not proper for us to inquire whether this action of the court was correct, for plaintiff does not assign it as error.

II. The action of the court in withdrawing the case from the jury must be reviewed upon the testimony admitted by



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<sup>2</sup> —: LIAB-  
ILITY of county. the court. We cannot reach the conclusion that there was any testimony submitted to the jury tending to prove that the county had ever assumed control of the bridge, or made appropriations for building it or keeping it in repair. These facts, certainly, if not more, must be made to appear, in order to establish defendant's liability. There was no error in withdrawing the case from the jury.

AFFIRMED.

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 WALKER V. STONE.

1. **Public Lands: PRE-EMPTION.** A person claiming under the pre-emption law must make an actual settlement in person, and he cannot recover damages from one whom he has employed to make improvements, and who, in violation of the conditions of his employment, has acquired for himself a homestead in the land.

*Appeal from O'Brien Circuit Court.*

WEDNESDAY, APRIL 3.

THE plaintiff averred in the petition that in June, 1871, he was about to take and occupy a certain tract of government land, as a pre-emption, under the laws of the United States, and that he made a verbal agreement with the defendant, by which the defendant was to do some breaking on said land, and to take care of and protect for plaintiff his rights in and to said land, and to notify plaintiff of any and all claims which might be made on or to said premises, as against plaintiff, during the time plaintiff might be absent therefrom; that thereupon plaintiff made pre-emption of, and took said land under said pre-emption laws, and paid to defendant ten dollars on said contract; that after commencing the performance of said contract, and while pretending that he was carrying out the conditions thereof, the defendant, without

## Walker v. Stone.

plaintiff's knowledge or consent, and with intent to cheat and wrong the plaintiff, did fraudulently procure to himself a homestead right to said premises, and destroyed plaintiff's rights thereto, to the damage of the plaintiff in the sum of one thousand dollars.

The defendant denied the alleged contract, and averred that the same was illegal and void, and in violation of the laws of the United States, governing pre-emptions.

The cause was referred. The referee reported that plaintiff should have judgment for two hundred dollars.

The report of the referee was approved by the court, and a judgment was rendered accordingly. Defendant appeals.

*D. A. W. Perkins and Chase & Taylor, for appellant.*

*Warren Walker, pro se.*

ROTHROCK, CH. J.—The testimony of the plaintiff, as it appears in the abstract, is as follows:

"In the month of June, 1871, I came to O'Brien county to procure pre-emption claims. At that time I entered into a verbal contract with defendant, whereby he was to do some work on my claim when procured, he agreeing to do some plowing and watch the claim for me. In case of any trouble, or in case of any one settling on the claim, or in case that he deemed it in any way in danger, he was to notify me by mail in case there was time, and if there was anything urgent, was to telegraph me. Mr. S. G. Sutter was to notify defendant upon what claims I made pre-emption, as I had several in view; defendant was then to perform his part of the contract, and I was to pay him a reasonable compensation. I afterwards made pre-emption at the Sioux City Land Office, upon the southeast quarter of section eight (8), township ninety-six (96), range forty-two (42), O'Brien county, being the same land where defendant now resides. Defendant was afterwards notified of the numbers of the land. I again returned to O'Brien county in October, 1871, and made some improve-

1. PUBLIC  
lands: pre-  
emption.

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ments on the land, and stayed there part of the time; took my meals on the claim at this time. Defendant advised me that I need not remain, and to wait until spring, and that the claim was all right, and that there would not likely be any trouble, and in case there was he would notify me immediately. As soon as I arrived at State Centre, I wrote to defendant. I again saw defendant at State Centre, Iowa, in January, 1872. We talked about the claim. He said it was all right, and there would be no trouble before spring. I paid him ten dollars. He said he had charged other parties five dollars for doing breaking on their claims, but that he had taken extra pains to watch mine; that he had found my claim all right in the Land Office at Sioux City, and that it was all right at the present time. I afterwards ascertained that he had filed a homestead on the claim in November, 1871. I came up to O'Brien county in February, 1872, and found that defendant had filed a homestead on the land. Defendant never notified me but that he was acting for me in good faith. I supposed, from defendant's statements, that he was watching the claim. The land at that time was worth one thousand dollars. Defendant never remunerated me for the money paid him, nor for the land in question."

*Cross-examination.*—"I stated that I had made some improvements on the claim, and stayed there part of the time. The improvements were that I dug a well, and my staying there consisted of camping out. We had a wagon, and cooked our meals on the ground, and only the blue sky and the wagon for a covering. We were there in this way one or two days, and stayed there one night. The well I dug was only a few feet from the bank of the creek, where there was water; the well was two or three feet deep. I did some work in June, 1871, on the claim, and took dinner on it at that time. This work consisted in commencing the erection of a sod shanty, by piling up a few sods, in order to commence an improvement before going to the United States Land Office. I never completed the sod shanty, for the reason that prior to

the time I was required to have a building erected thereon it was homesteaded by the defendant. I claimed my residence in O'Brien county from June, 1871; was stopping temporarily in State Centre, until I came up to O'Brien county in 1872."

Conceding that the contract was made as plaintiff claims, we are clearly of the opinion that he cannot recover damages for its breach.

The pre-emption law requires that any one claiming its benefits shall make an actual settlement, in person, upon the land claimed. There must be an actual settlement, in person, before any right attaches. United States Rev. Statutes, §§ 2259, 2264.

This cannot be done by an agent, nor by proxy. To give the acts of the plaintiff the most liberal construction, his settlement and improvements were merely colorable. Taking dinner on the land in 1871, and piling up a few sods, and staying one night and one or two days, in a covered wagon, and digging a well two or three feet deep on the land in October, 1871, may be such a settlement as would likely be respected by others seeking pre-emption claims, but that it can be made the basis of a legal claim cannot be admitted.

If, then, plaintiff had no valid claim upon the land, no legal fraud was committed by the defendant. The plaintiff could not be defrauded of that which he did not have. However reprehensible the conduct of the defendant may have been in homesteading the land, yet it is one of those moral delinquencies which are left by the law without remedy.

The abstract purports to contain all the evidence. The plaintiff, in his argument, insists that in this the abstract is incorrect. If this be true, the plaintiff should have prepared an additional abstract, with the proper corrections.

Believing that the case, as made by the plaintiff in the petition, and in his testimony, did not warrant the conclusion reached by the referee and the court below, the judgment is

**REVERSED.**

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Gibbs v. Buckingham.

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## GIBBS V. BUCKINGHAM.

1. **Practice:** CERTIFICATE OF JUDGE: BILL OF EXCEPTIONS. A certificate of the trial judge, made a year after the trial, to the effect that the evidence contained in the abstract was all the evidence submitted upon the trial, is not a compliance with the statute, and the bill of exceptions may be stricken from the record upon motion.
2. ———: CHANGE OF VENUE: NEW TRIAL. Pending an application for a new trial upon the ground of newly discovered evidence, made subsequent to the trial term, a change of venue may be granted upon a proper showing therefor.

*Appeal from Monroe District Court.*

WEDNESDAY, APRIL 8.

On the 22d day of February, 1875, the plaintiff filed a petition in the Mahaska District Court, under section 3155 of the Code, for a new trial, upon the ground of newly discovered evidence, of an action tried between the above named parties at the December Term, 1874, of said court, and which was determined adversely to the plaintiff.

On the 17th day of February, 1875, the plaintiff filed a motion for a change of venue, on the ground of the prejudice of the judge. This motion was sustained, and the venue was changed to the District Court of Monroe county, in the fifth judicial district, to which order and ruling the defendant at the time excepted.

On the 21st day of April, 1875, the defendant filed in the Monroe District Court a motion to strike the cause from the docket, and order the clerk to transmit the records to the District Court of Mahaska county, whence the cause came, upon the ground that that court had no right to entertain or grant a motion to change the place of trial, upon a petition for a new trial, and its action in that respect was without jurisdiction, and void. The court overruled this motion. The defendant excepted.

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Gibbs v. Buckingham.

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The cause was tried by the court at the November Term, 1876, and it was ordered that a new trial be granted to the plaintiff. The defendant excepted, and now appeals.

*Bolton & McCoy* and *M. E. Cutts*, for appellant.

*John F. Lacey*, for appellee.

DAY, J.—I. No bill of exceptions was signed by the judge who tried the cause, showing the testimony introduced, or the rulings made upon the trial.

On the 22d day of November, 1876, the short-hand reporter executed the following certificate: "I, W. S. Briggs, I. PRACTICE: certificate of judge: bill of exceptions. short-hand reporter in and for said county, do hereby certify that I reported the foregoing testimony on the trial of said cause of *Gibbs, Administrator, v. Buckingham*, at the November Term, 1876, of said court, and that the same, and exhibits and depositions therein referred to, contain all the testimony, rulings of the court, and exceptions thereto taken upon said trial."

On the 26th day of November, 1877, the judge who tried the cause signed the following certificate: "I certify that the evidence referred to and enumerated in the foregoing certificate of W. S. Briggs, short-hand reporter for the District Court of the second judicial district, including the county of Monroe, was all the testimony in the case of *Gibbs, Administrator, etc., v. W. J. Buckingham et al.*, tried at the November Term of the District Court of Monroe county, 1876." This certificate was made one year after the trial. The plaintiff moved to strike out the bill of exceptions thus made up, for the reason that it was not signed within the time by law prescribed. In *State v. Fay*, 43 Iowa, 651, where the evidence was reduced to writing during the trial, showing the rulings of the court touching the admission and exclusion of evidence, and the judge certified that the writing contained all the evidence and the proceedings on the trial, we held that there had been a sufficient compliance with the statute re-

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specting bills of exceptions. But in order that it may have this effect the certificate must be signed within the time prescribed for signing a bill of exceptions. The bill of exceptions must be signed during the term, unless the parties agree to extend the time beyond the term. Code, § 2831; *Harrison v. Charlton*, 42 Iowa, 573. If a bill of exceptions is not signed within the time prescribed by statute, and there is no agreement of parties extending the time of signing, it may be stricken from the record on motion. *Lynch v. Kennedy*, 42 Iowa, 220. The motion preferred in this case must be sustained.

II. Nothing remains in the record to be considered but the ruling of the court granting a change of venue. It is claimed that the court had no jurisdiction to grant a change of venue in this case.

Section 3155 of the Code provides that, where the grounds for a new trial are discovered after the term at which the decision was rendered, the application may be made <sup>2. — : change of venue: new trial.</sup> by petition, on which notice shall be served and returned, and the defendant held to appear as in an original action, and the case shall be tried as other cases by ordinary proceedings. Under this section we think the right to a change of venue attaches to this proceeding, when the recognized grounds for it exist.

**AFFIRMED.**

## STEEL &amp; SON V. FIFE ET AL.

1. **Statute of Frauds: AGENT.** Where the owner of real estate wrote to his agent that he would sell the same at a price named, whereupon the plaintiff agreed to purchase, it was *held*, that the possession of the letter by the agent was not sufficient to take the case out of the operation of the statute of frauds.
2. ———: **POSSESSION OF WRITING.** The execution of a deed without delivery, in such sense that the grantee acquires control of it, does not constitute a compliance with the statute, even though the grantee may temporarily have it in his possession.

*Appeal from Cherokee District Court.*

WEDNESDAY, APRIL 8.

THE petition states defendants are owners of certain real estate described therein, and that plaintiffs applied to one Johnson, their agent, to purchase the same; that afterwards, Johnson informed plaintiffs he had received a letter from defendants stating they would sell a portion of said real estate for \$650; that plaintiffs accepted said proposition, and requested Johnson to procure a deed therefor; that in pursuance of said offer and acceptance defendants executed and delivered a deed to plaintiffs; that said deed was full, complete, and perfect in every respect except that the acknowledgment was defective. For which reason only the said deed was returned to said Johnson, and the same never has since that time been in possession of plaintiffs. The purchase price of the premises was paid into court, and plaintiffs seek in this action to compel the defendants to specifically perform said alleged contract. The defendants denied the allegations of the petition, and relied on the statute of frauds as a defense.

The court found for the plaintiffs, and entered a decree accordingly.

The defendants appeal.



*Eugene Cowles*, for appellants.

*Wakefield & McAndrew* and *J. D. F. Smith*, for appellees.

SEEVERS, J.—I. It is not alleged in the petition, or claimed by counsel for the appellees, that Johnson was the agent of the plaintiffs, but that he was the agent of the defendants. This being true, the delivery of the letter to Johnson could have no other or greater effect than if it had been written and retained in the possession of the defendants. It is unquestionably true that a memorandum, agreement or deed must be executed by the party to be bound, or his authorized agent, and delivered to and accepted by the other party to take the case out of the operation of the statute and its clear intent and meaning. In *Grant v. Levan*, 4 Penn. St., 393, there was found among the papers of Robert Martin, deceased, a plat of certain lands on which was indorsed, in his handwriting, "These lands sold to Robert Morris, Esq., of Philadelphia. Deeds poll to him. Purchase money paid me, Robert Martin. The overmeasure to be cast up and accounted for." It was sought to compel a specific performance. The defense was the statute of frauds. The court say, "But an agreement is the assent of two minds to the same thing; it requires that the written evidence of it, when it is reduced to writing, as well as the agreement itself, should be seen and assented to by both parties. \* \* It may be evidenced by a letter sent from the one to the other, and accepted as well as acted upon as an offer of terms, or by a receipt or memorandum sufficiently stating the conditions; but in these instances the paper is parted with as evidence of the thing agreed to. The principle that delivery is necessary to give effect to a written agreement is not confined to specialties."

In the case at bar plaintiffs never even saw the letter. All the knowledge they had of its contents was derived from Johnson. Nor is the letter before us. Nor have its contents been proven except as its contents were declared or stated by Johnson; and as it never was delivered, but retained in their pos-

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session by the defendants, or rather by their agent, we hold that it is not sufficient to take the case out of the operation of the statute.

II. The petition avers that the deed was executed and delivered to the plaintiffs, and returned only because it was defectively executed. This is not strictly true. The only evidence on this subject is that of one of the plaintiffs. He states: "I had in my possession papers or instruments signed by the defendants in this action, in reference to the conveyance by the defendants of said lot of land described in the petition to the plaintiff. I had papers in possession three different times, *not under my control*, but they were in my custody for a short time." It is clearly apparent from the foregoing there never had been any delivery of the deed. If there had been, it would have been under the control of the plaintiffs. They would have had dominion over it. We have then this case: The defendants executed a deed which was defectively acknowledged, and never delivered, upon which the plaintiffs rely as a writing under the statute to enable them to compel a specific performance.

We adopt the language used by the court in *Johnson v. Brooks*, 31 Miss., 17, where it is said: "We have been able to find no cause in which a writing, signed by a party, and kept in his possession without a delivery, has been held to be a compliance with the statute."

The deed between the parties was a full and complete conveyance of the premises. We are not called on to determine what would have been its effect as a memorandum in writing under the statute. We are not prepared to say that, if it had been delivered and accepted, an action might not have been brought, and a decree rendered that would have made it effectual as against the world.

III. The court, on the petition of the plaintiffs, ordered the defendants to produce, on the trial, the letter and deed to be used as evidence. This the defendants declined to do, but made a showing why they could not comply with the order.

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At the hearing the plaintiffs moved the court for judgment, because of this failure. The showing made must have been regarded as satisfactory by the court, as the motion was overruled. From this action there has been no appeal. It is, to say the least, doubtful whether we can correct the error, if it be one. But this is immaterial under the view we have adopted. As we have substantially conceded, the several writings contain just what the plaintiffs claim. To constitute a good delivery of any writing, it must be voluntary. Therefore, if this was compelled under a compulsory order of the court, it would not constitute a voluntary delivery.

IV. A motion is filed by the appellees to strike from the files the reply of appellant to the argument of appellee, on the ground that the cause is triable *de novo* in this court, and the plaintiffs and appellees have the burden of proof, and are entitled to the opening and closing argument. Strictly speaking, this is true, and as the motion is made, we cannot disregard it. The motion must be sustained.

The cause will be remanded to the court below, with directions to dismiss the petition, and render a decree for the defendants.

**REVERSED.**

## BARRETT V. LOVE.

1. **Tax Deed: STATUTE OF LIMITATIONS: WHEN ACTION BY PURCHASER IS BARRED.** Four years after the execution of a tax deed, the holder of the patent title took possession of the land, which was, up to that time, unoccupied prairie. After the expiration of five years from the recording of his deed, the tax purchaser brought an action to recover possession: *Held*, that he could not recover.

*Argument 1.* The statute of limitations commences to operate upon a tax deed at the time of the recording of the instrument, and the bar to an action to recover possession thereunder becomes complete at the expiration of five years.

*Argument 2.* Both patent owner and tax purchaser are to be regarded as continually claiming title from the time the deed is recorded, and neither has any right under the statute not enjoyed by the other.

*Argument 3.* It is within the province of the legislature to provide that an action for the recovery of lands, held by the assent or sufferance of the owner, and not adversely, will be barred within a prescribed time, and section 902 of the Code is an exercise of this legislative authority. *ADAMS, J., dissenting.*

*Appeal from Mills Circuit Court.*

WEDNESDAY, APRIL 3.

THE petition states that plaintiff is entitled to the immediate possession of certain land therein described, and that he is the owner in fee simple; that the defendant wrongfully keeps him out of possession thereof. An abstract of title is attached to the petition, from which it appears that the plaintiff claims title and possession under and through a tax deed executed the 6th day of January, 1868, and recorded on the 28th day of the same month.

The answer admits the correctness of the abstract of title, and avers that plaintiff's cause of action is completely barred and cut off by the statute of limitations; that defendant is the absolute owner of the premises in controversy, and that he

48	103
37	119
122	312

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has been in possession thereof under claim of ownership since February, A. D. 1872; and defendant attaches to the answer an abstract of title, from which it appears that he claims title under and through the patentee, having purchased the same February 2, 1872, and holds under a bond for a deed upon payment of the purchase money.

The plaintiff in his replication denies the allegations in the answer, and also relies on the statutory bar. Judgment was rendered in favor of the defendant, and the plaintiff appeals.

*Dailey & Burke and Barcroft, Given & Drabelle*, for plaintiff.

*Watkins & Williams*, for defendant.

SEEVERS, CH. J.—I. There was a jury trial, and general verdict for the defendant. There were also special findings by the jury as follows:

1st. Do you find that defendant Love hauled out rails, posts, and logs, and placed same on the land in controversy; and, if so, when did he commence doing so?

Answer: Yes, about 1st of March, 1872.

2d. Did defendant himself, or with himself and others, burn the old grass off the land in controversy, for the purpose of preparing the same for cutting hay thereon; and if so, when?

Answer: Yes, in spring of 1872.

3d. Did defendant cut the grass on the premises in controversy, and give others permission to do so, on the shares, during the haying season of 1872?

Answer: Yes.

4th. When, if at all, did defendant Love undertake to build a fence on the premises in controversy?

Answer: In the spring of 1872.

5th. Did he permanently abandon such undertaking?

Answer: No.

6th. When, if at all, did defendant actually inclose the premises in controversy with a fence?

**Answer:** In spring of 1873.

**7th.** That if you find the defendant was in possession of said land, prior to the commencement of this suit, please state how long he had been in possession, and when such possession commenced?

**Answer:** Since the summer of 1872. Commenced in March, 1872.

**8th.** Did James Callanan have any knowledge of such acts, and acquiesce in them; and if so, when did he gain such knowledge?

**Answer:** In June, 1874.

During the trial the plaintiff objected to any evidence tending to show that defendant had cut grass on the premises during the summer of 1872, because it neither proved ownership nor possession. While if there had been no other testimony tending to show possession, the evidence objected to may have been immaterial, still we think it was admissible as tending to show, in connection with the other testimony on the same subject, that defendant was in possession at that time. The evidence tended to show the facts found by the jury in the special findings other than the one in relation to cutting grass, and it is not seriously claimed, we think, these findings are against the weight of the evidence. If, however, we are mistaken in this, such findings, under the settled and uniform rulings of this court, cannot be disturbed or set aside.

II. The plaintiff asked a witness the following question: "State what, if anything, you know of this property in controversy being improved by Mr. Love." To which the defendant objected, on the ground of immateriality, and the court sustained the objection. The value or extent of the improvements was wholly immaterial, except as it may have tended to prove or disprove the defendant's possession of the premises. The material question was one of possession, and not improvement. There was no error, therefore, in the ruling made by the court.

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III. It is conceded the tax deed, under which plaintiff claims, was recorded on the 28th day of January, 1868, and the jury have found, as a fact, that the defendant was in possession in March, 1872. The presumption is such possession was continuous from that time forward, and the petition states that defendant was in possession at the commencement of the action, in August, 1874. It, therefore, clearly appears that defendant was in possession in January, 1873, when five years from the recording of the tax deed expired.

It is insisted by the plaintiff the statutory bar does not apply to the purchaser, when the land was unoccupied at the date of the sale or recording of the deed, and, on the other hand, the defendant claims the statute begins to run from the recording of the deed; or, if this be not true, then as he was in possession for ten months previous to the expiration of the five years, the bar of the statute is complete. The statute is as follows: "No action for the recovery of real property sold for the non-payment of taxes shall lie, unless the same be brought within five years after the treasurer's deed is executed and recorded." Rev., § 790; Code, § 902. Nothing is said as to possession, but the statutory bar seems to be complete at the expiration of the five years. If, after the expiration of that period, either the purchaser or the owner is compelled to resort to an action for the purpose of vindicating his title or possession, the bar of the statute operates on and is decisive that the action cannot be maintained. No distinction is made between the purchaser and owner; both are alike subject to the provisions of the statute. This is the effect of the ruling in *Brown & Sully v. Panter*, 38 Iowa, 456.

It is true that in Wisconsin and Pennsylvania it is held, if no one is in possession until after the prescribed period of limitation has expired, the title of the purchaser is complete and perfect, and if the owner then enters into possession the purchaser may then have his action to recover such possession. It is also held in Pennsylvania that the statute does not begin

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to run against the purchaser until he has taken possession. *Waln v. Shearman*, 8 S. & R., 357. After this decision was made, a statute was passed authorizing the owner to bring an action against the purchaser, whether in or out of possession. In commenting on this statute it is said in *Robb v. Bowen*, 9 Penn. St., 71: "In *Waln v. Shearman* it was decided that the limitation commenced at the time possession was taken by the purchaser, because the owner had for the first time an opportunity of legally asserting his title. The reason of the law is the life of the law, and the spirit of that decision is, that it would be unjust to make the statute run when the owner had no opportunity to assert his title, but perfectly fair to launch it from the time he had such opportunity." It is urged that in *Eldridge v. Kuehl*, 27 Iowa, 160, we determined our statute was borrowed from Pennsylvania, and, therefore, the construction of such statute by the courts of that State will also be adopted by us. This may be true with the limitation that all the statutes of the State from which ours is borrowed on the given subject are identical. *Jamison v. Burton*, at present term. But there never was any statute in that State, or in Wisconsin, like ours, authorizing any person claiming an interest in real property, whether in or out of possession, to bring an action to quiet the title against any person claiming title thereto, though not in possession. Rev., § 3601; Code, § 3273. It is at least fairly inferable, from what is said in *Robb v. Bowen*, *supra*, if such a statute had been in force in Pennsylvania, that the decisions in that State would have been in accord with our views as herein expressed. As the holder of the tax title has the opportunity, under our statute, to bring an action at the time the deed is recorded, we, in the language of the Supreme Court of Pennsylvania, believe it to be perfectly fair to launch the statute from such time. In the absence of any authority, and construing the statute for ourselves, we have no hesitation in holding that such is the only fair construction that can be adopted. The right to bring an action to quiet title is equally



open both to the owner and purchaser. The limitation, or right to bring an action, applies to each equally. There is no reason why one must bring an action within the five years, and not the other. The language of the statute is clear and express, that no action shall lie unless brought within the given period. Within that period the defendant was in possession, and, this action not being brought until the five years had elapsed, the bar of the statute is complete.

IV. It is insisted the tax deed draws with it the constructive possession of the premises, when the same consists of unoccupied lands, and the putting the deed on record amounts to such an assertion of title as to compel the owner to bring an action within five years thereafter, in order to prevent the bar of the statute from being complete as to him, but the purchaser, because he is deemed to be in possession, is not required to do so. The statute itself warrants no such construction, and it is founded on the construction of statutes different from ours by the courts of other States, and is based on the thought that the owner, in permitting his land to be sold for taxes, has abandoned all claim or title thereto. In view of the known and acknowledged history of our State, the position taken is not true, for it is well known and understood that many persons, from sheer necessity, permit their lands to be sold for taxes, and others through carelessness. It may be said, with entire safety, in no case does the owner thereby intend to abandon his title. There is, therefore, neither sense nor reason in so holding. On the contrary, we hold, in accord with such well known history, that the owner is continually claiming title, and that he is within the spirit and letter of Rev., § 3601 : Code, § 3273. At the same time, it is true the purchaser is also claiming title from the time his deed is recorded. Both are thus placed on an equality, and this, it seems to us, is the only just and equitable rule within the letter and spirit of the statutes on this subject. No hardship is thus imposed on the purchaser, as all the titles in our State are derived from the United States, and are of

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record in the several counties. The purchaser, therefore, can readily ascertain against whom to bring the action.

We have thus indicated our views, as the same have been presented by counsel, without particular reference to the errors assigned, deeming such to be the better mode of disposing of the questions involved.

AFFIRMED.

ON REHEARING.

BECK, J.—A rehearing having been granted upon the petition of plaintiff, this cause was again argued by counsel originally appearing in this court for the respective parties, as well as by others who are interested in cases which involve the questions discussed before us. These arguments have been elaborate and able, and have covered the field of dispute as marked out in the discussion.

We have again, with the patience and care demanded by the importance of the questions involved, considered the case, and have reached the conclusion that our former judgment is correct.

We will proceed, with all brevity the nature of the case permits, to present another view of the questions involved, which leads us to a very satisfactory conclusion that the decision announced in our first opinion is correct.

I. We think that confusion, to some extent, has arisen in this discussion of the case, from the failure to discriminate between the statute we are called upon to construe, and other statutes of limitations, which are the foundations of decisions that have become familiar legal precedents. This has led counsel to the application of rules to this case which are, indeed, inapplicable.

That we may have a clear apprehension of the question before us, we will state the controlling facts of the case. The plaintiff, claiming to be owner in fee of the lands in controversy, brings this action to recover possession thereof. His petition shows that his title is based upon a tax deed, executed

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January 6, 1868, and recorded on the 28th day of the same month. The defendant admits, in his answer, the tax title set up by plaintiff, but interposes the statute of limitations as a bar to the action. The defendant claims title to the land by a regular chain of conveyance from the government. The action was commenced in 1874, more than five years after the tax deed was recorded. The defendant was in actual possession of the land for near one year before the action was commenced. Prior to his possession the land was wild and unoccupied.

The question for determination is this: Is plaintiff's action barred by the statute of limitations (Code, § 902) applicable to the case? Counsel for plaintiff insist that it is not, for the reason that defendant was not in possession of the land for a time that would enable him to interpose the statute as a defense. They maintain that the statute will not run against plaintiff, unless defendant, for the whole period of limitation, was in the actual adverse possession of the land. This view is based upon the thought that the statute cannot be invoked for the protection of one who has not, for five years, the period of limitation, held the land adversely to plaintiff. It arises from overlooking the differences between this statute and other statutes of limitations, to which the rule and doctrine of adverse possession are applied by the courts. These statutes, like our own general statute of limitations (Code, § 2529), in most cases, follow the English Statutes of 21 James I., ch. 16, and 3 & 4 William IV., ch. 27, and provide for a limitation that shall arise within a prescribed time after plaintiff's cause of action accrued. Our general statute of limitations is in these words: "The following actions may be brought within the times herein limited respectively *after their causes accrue*, and not afterwards: \* \*

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| 1. | * | * | * | * | * |
| 2. | * | * | * | * | * |
| 3. | * | * | * | * | * |
| 4. | * | * | * | * | * |
| 5. | * | * | * | * | * |

Those brought for the recovery of real property, within ten years." Code, § 2529.

Under the express language of this statute, the period of limitation begins at the time the cause of action accrues. The courts are required to determine in each case when this event occurred, that is, when the particular cause of action accrued. In suits to recover the possession of lands, it is uniformly held that the action accrues at the time adverse possession is taken and held by the defendant, or those under whom he claims. This rule is based upon the following clear reasons and undisputed principles:

At the common law one holding the fee simple title of lands, not occupied adversely to him, is presumed to be seized, possessed thereof. We have a statute to the same effect. Code, § 1928. This presumption of seizure continues until the owner is disseized. Where the land is held under any form of tenancy, his seizure is not disturbed, for the possession of the tenant is the possession of the landlord. He may, by his assent, suffer the possession of the tenant to continue for any time, and as long as it is held under the tenancy, it is regarded by the law as his own possession. In such case no cause of action arises. As long as the occupancy continues, it is presumed to be at the sufferance of the land-owner, and that sufferance is only terminated by the commencement of the action.

In the case of the unlawful possession of land taken by a trespasser, the law does not regard the owner as disseized, dispossessed; he is still presumed to be in the seizure, possession of the land. The trespasser remains in the possession by the sufferance of the owner, and acquires no right thereby.

Disseizin occurs only when an entry is made upon lands, *i. e.* possession taken, unlawfully and without assent of the owner, with the intent to hold the estate therein under claim adverse to him. This is the meaning of the word *disseizin*, as used by the writers of the common law. When such an entry is made, it is not with the assent of the owner, nor held

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by his sufferance. The possession of the usurper is not under the owner, but independent of him. The owner is, therefore, said to be *ousted* of his freehold, because the presumption of law that he is in possession of the land no longer exists. This presumptive possession is terminated by the entry of the adverse claimant who turns him out of possession—ousts him of the freehold.

Now, in the case of a tenant, or one whose entry was with the assent of the owner, or lawful (*congeable*, as the old writers call it), the possession held by him, as we have seen, was in subordination of the owner, and by his sufferance, which was only terminated by suit brought, and the cause of action, therefore, arose at the commencement of the suit. But in the case of the disseizor, the entry is not *congeable* (with assent of owner or lawful) and the possession is not held by sufferance of the owner, but by claim in conflict with his title. An action at once accrued; the entry of the disseizor marked the time of its accruing.

A few additional remarks, by way of illustration, may be added, if it be worth while to attempt to make clearer that which is so very plain. One holds my land with my assent, or by my sufferance. His possession in law is my possession as long as my assent or sufferance continues. I may at any time resume the possession in myself, in the manner pointed out by law, namely, by action. It is clear that my cause of action to acquire in myself the possession held for me arises when my assent or sufferance is terminated, which only happens when I take the proper steps to acquire the possession by instituting suit. But where one holds my lands adversely to my title, his possession is not regarded by the law as my possession, for he holds not by my consent or sufferance. My cause of action arises against him upon his entry under adverse claim.

For these reasons, and upon these principles, it has been uniformly held, under statutes limiting actions for the recovery of land to a period commencing with the time when the

cause of action accrued, that the bar did not exist, and the limitation did not run except in favor of disseizors, namely, those who entered or held land under a claim adverse to the party bringing the action. Hence, adverse possession is held by the courts to be necessary to support the plea of the statute of limitations in an action to recover land.

It is entirely unnecessary to enter into a discussion of the doctrine of adverse possession, and inquire when it exists. For the purpose of this case, it may be admitted that defendant at no time, after the acquisition of the tax title by plaintiff, held the land adversely to him.

II. It cannot be doubted that the Legislature may so form a statute that, in cases of this character, an action for lands held by the assent or sufferance of the owner, not adversely, will be barred within a prescribed time. The Legislature may, in such cases, require titles to be enforced by the acquisition of the possession of lands, against those who do not hold adversely, within a prescribed period, and bar recovery thereafter. Of this there can be no question. Reasons founded upon sound policy may be adduced to support such statutes when the titles barred thereby are based upon judicial or tax sales, or upon other methods of alienation without the assent of the party whose lands are thereby conveyed.

The statute invoked by defendant in this case is of this character, as we shall now proceed to show. It is in the following language: "No action for the recovery of real property sold for the non-payment of taxes shall lie, unless the same be brought within five years after the treasurer's deed is executed and recorded." Code, § 902.

The commencement of the period of limitation is fixed by the words of the statute at the time when the title fully vested under the tax deed, namely, the recording of that instrument. It is not, as the general statute of limitations of our State and those of most other States, the time when plaintiff's cause of action accrued. Under the rules of law above stated, the holder of the fee simple title is presumed to be in possession,

if the land be not held adversely to him. But the holder of the tax title can recover in himself the actual possession, if the land be held by the former owner, only under the tax deed by action. This action cannot be brought, under the express words of the statute just quoted, after the expiration of five years from the day the tax deed was recorded. The character of the possession of the defendant, whether it be adverse or not, has nothing to do with plaintiff's right of action, if defendant resists recovery. Of course, if defendant admits the tax title, and that he holds under plaintiff, and offers no defense to recovery, plaintiff would be entitled to judgment.

The petition in this case alleges that defendant is in the possession of the land. Indeed the action could not be maintained unless such averment were made and proved, if put in issue. The act of plaintiff in bringing the suit and his averments in the petition, as well as the allegation of defendant's answer and the proof, show defendant to be in the actual possession of the lands. By his pleadings he resists plaintiff's right to recover. The character and nature of his possession, whether adverse or otherwise, and the time of its duration, we have seen are immaterial.

III. Something has been said in argument as to the right of the holder of a tax title to maintain an action to recover possession when the land is wild and unoccupied. If no one is in actual possession, there is no necessity for the action, for the holder of the title may enter without it. But, if in such case, an action is brought and the possession is alleged to be in defendant, and the fact is admitted by his answer, the plaintiff is bound by the case made by the pleadings, and cannot be permitted to show that defendant is not in actual occupancy of the land.

IV. There has also been something said as to the rule which must govern in the application of the statute under consideration to cases where actions are brought to quiet titles, by the holders of the tax titles, when not in possession of the

land, which they may do under Code, § 3273. The questions presented in the discussion upon this point need not be considered, as they do not arise upon the facts of this case.

V. It is proper here to notice objections urged against the conclusions we have reached, which, as we believe, are based upon misapprehension and misapplication of the doctrines we recognize.

The seizin of land not held adversely is in the holder of the title. If it be unoccupied, the owner has the *constructive* possession. But it will be remarked that this is a presumption of law, and the rights of the owner are not the same under this constructive possession as under actual possession.

If lands are unoccupied, one who enters upon them under a *bona fide* claim of title does not violate the law. Indeed, the law respects the possession thus taken, and the statute of limitations, after the time prescribed has expired, will bar an action against him.

But one who enters, under like claim of title, upon occupied lands, does violate the law, and the possession he acquires will be restored to the owner in an action of forcible entry and detainer. It is a grave error to regard the holder of the patent title as a violator of law, when he enters upon the actual occupancy of lands, before unoccupied, upon which a tax title rests. If, therefore, our conclusions serve as an invitation to the holders of patent titles to take possession of unoccupied lands sold for taxes, they are invited to do no more than the law sanctions. The owners of unoccupied lands hold them subject to the right of *bona fide* claimants to enter upon their possession. There can be no exception in favor of holders of tax titles.

VI. Actual possession under a tax title is protected by the law as possession under other titles. No right would be defeated, nor the title made invalid by the unlawful disturbance of the actual possession of one holding a tax title. The law gives the holder of such title a remedy for the re-



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covery of the actual possession of land of which he was unlawfully deprived.

VII. It is said that, under our decision, a case may occur in which the tax title holder will be remediless. It is this: Four years and three hundred and sixty-four days have expired since the tax deed was recorded. On the last day of the five years, in which, under the statute, the action may be brought by the holder of the tax deed, the former owner enters upon the occupancy of the land. The action is barred the next day, and the tax title is defeated. The owner, it is said, lost the land because he had one day and no more in which to bring his action! This proposition of fact is supposed to demonstrate the injustice of our conclusion, and afford a firm foundation for an argument which overthrows it. The proposition, as to its facts, may be fully admitted. It will be readily seen that the holder of the tax title is in precisely the same condition he would occupy, as to the alleged injustice, in case the former owner had been in actual possession when the tax deed was recorded, and continued his occupancy for five years. In such a case, it is admitted on all hands, the tax title is barred in five years. Now the holder of the tax title did not bring his action on the last day of the five years, and lost his land because he had that last day and no more—no time after the last day—in which to bring his action. It is true he had five years in which he could have brought his action and secured the land. And he had four years and three hundred and sixty-four days, in the other case, in which he could have taken possession of the land, without even the cost of an action, for no action was necessary, and one day in which an action was necessary. We fail to see that injustice is suffered in either case. The holder of the tax title neglected to resort to the remedies the law provided, in the one case by an action, in the other by his own act, during the time given him by the statute for the commencement of his suit, and the recovery of his land. He cannot afterwards have his action at law. The remedy by his own act in enter-

ing upon the occupancy of the land, is secured him by the law. There is no greater hardship wrought him by the rule which defeats recovery of the land after he has neglected this remedy, than he suffers in the application of the same rule in bar of his action, when the land has been held adversely for the period of limitation.

VIII. We fail to see any advantage to be gained by either party in forcibly taking possession of the land, after the period of limitation has expired. We think, therefore, that the objection based upon the ground that "physical force" would be resorted to, in order to gain possession of lands, is without foundation.

IX. It will be understood, we do not hold that possession acquired by the former owner, after the expiration of the period of limitation, will enable him to set up the statute as a bar to an action by the holder of the tax title. The point is not in this case, and we do not decide it.

X. We may admit, as fully as the claim is made in argument, for the purpose of our present discussion, that the cause of action of the holder of a tax title does not accrue against the former owner until the latter enter upon the actual occupancy of the land. This admission, were the statute of the character and force which the advocates of the view adverse to ours insist on giving it, would dispose of the case. But the statute provides that the period of limitation begins when the deed is executed and recorded. The accruing of a right of action has nothing to do with the running of the statute. We know of no authority which courts possess to interpolate the statute with words giving it a meaning not intended by the Legislature. Its reading is, that the period of limitation begins at the execution and recording of the tax deed. We cannot interpret its words to mean that the period of limitation shall begin when a cause of action at law accrues; nor can we give it such an interpretation, by the interpolation of words to that effect. Finding the meaning of the statute plain, and that it is not in conflict with the con-

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stitution, no objection on that ground being made to its provisions, we must give it such force as its true meaning demands. Its probable effect in cases that may be imagined, and its policy, are not to be considered in order to defeat its provisions. It is sufficient for this court to know that the statute is the expression of the legislative will; *ita lex scripta*. So it must be enforced.

XI. Statutes limiting actions to recover lands upon tax titles, containing provisions similar in character to our statute upon the same subject, prevail in Wisconsin and in Pennsylvania. In the State first named, it is held that the execution and recording of a tax deed draws after it the possession of unoccupied lands. The former owner, in order to plead the statute, must be in actual occupancy of the land. *Dean v. Early*, 15 Wis., 100; *Jones et al. v. Collins et al.*, 16 Wis., 594. But it is not held that such actual occupancy must have continued for the whole period of limitation.

It is also held, in the same State, that when lands are actually unoccupied during the period of limitation, the tax title becomes absolute against the former owner, and he cannot afterwards take possession of the land, and plead the statute to an action by the holder of the tax title. *Lawrence v. Kinney*, 32 Wis., 281. These decisions are not in conflict with our conclusions in this case.

In Pennsylvania it was held, in an action to recover lands upon a tax title, that the statute only ran from the time the purchaser entered into possession of the lands. The ground of the decision seems to be that the former owner had no remedy by action to test the tax title, the holder of that title not being in possession. *Waln v. Shearman*, 8 S. & R., 357. A subsequent statute authorized the former owner to bring an action to test the tax title, notwithstanding the holder of that title was not in possession of the land. It was thereupon held that an action by the owner would be barred, though the holder of the tax title was not in actual possession of the land. *Robb v. Bowen*, 9 Penn. St., 71. The decision is reconciled with

*Waln v. Shearman*, on the ground that the subsequent statute gives the former owner an opportunity to test the validity of the tax title by action, though he be in possession of the land. A similar statute, as we have before stated, exists in this State. Code, § 3273. The case last cited supports the views we have adopted.

It will be remembered that the statute in question applies equally to actions brought by the holders of tax titles and the former owners.

We remain well satisfied with the conclusion announced in our first opinion, and adhere to it.

ADAMS, J., *dissenting*.—I concurred in the opinion originally filed in this case, but I may be allowed to say I did so with great hesitation, and with many doubts as to its correctness. I am now fully satisfied that the conclusion then reached, and to which my associates still adhere, is wrong.

The question arises upon the construction of Section 902 of the Code. The section is in these words: "No action for the recovery of real property, sold for the non-payment of taxes, shall lie unless the same be brought within five years after the treasurer's deed is executed and recorded."

This action is brought for the recovery of real property sold for the non-payment of taxes, and is not brought within five years after the treasurer's deed was executed and recorded. My associates think that the action is barred. In my opinion it is not. I do not think that the statute is applicable to this case.

When the holder of the patent title is in possession at the time of the execution and recording of the tax deed, and does not voluntarily yield the possession, then it is to be recovered by the holder of the tax title. If the holder of the patent title remains in possession five years, the law conclusively presumes that possession ought not to be recovered of him, and he is not bound to preserve any longer the evidence of his right to retain possession.

But if the holder of the tax title takes possession, and afterwards the holder of the patent title disseizes him, rendering an action necessary to recover possession, it is not for the disseizor to reap the advantage of his disseizin if the action to recover possession thus made necessary is not brought within five years from the recording of the tax deed.

In the case at bar the plaintiff was in the possession of the land from the time his deed was executed until the defendant's wrongful entry, which was over four years. I say he was in possession, because it is not disputed that he had the legal title, and the land was unoccupied. The law construes the possession of unoccupied land as in the holder of the legal title. And this is so even where the legal title is a tax title.

In *Dean v. Early*, 15 Wis., 100, the court said: "The formal execution and record of a tax deed draws after it the possession." Again, in *Jones v. Collins*, 16 Wis., 594, the court, speaking also of a tax deed, said: "The doctrine undoubtedly is, that the recording of the deed draws after it the constructive possession in a case where the premises are unoccupied, or there is no actual possession in either party." Again, in *Lawrence v. Kinney*, 32 Wis., 293, the court, speaking also of a tax deed, said: "It certainly requires explanation to enable one to see how a deed, declared by law to vest an absolute estate in fee simple in the grantee, and presumed in law to be in all respects regular and valid, shall be held not to draw after it the constructive possession of unoccupied and wild lands."

The doctrine, as above enunciated, cannot, I think, be successfully controverted. No court, so far as I have discovered, has ever held otherwise. Indeed, no question is made by the majority of this court upon this point. It may be assumed then that the plaintiff had constructive possession for over four years, and until he was disseized. His rights then were precisely the same as they would have been if he had held actual possession during the same time, and had been dis-

seized. In either case the disseizin constitutes the cause of action. Prior to it no cause of action existed.

Where the holder of the patent title is in actual possession when the tax title accrues, a cause of action exists at once in favor of the holder of the tax title, and to such case the statute in question was designed to apply. To hold it to be applicable where the holder of the tax title *has been in possession and has been disseized*, reduces it to an absurdity. The time of the accruing of the tax title has no proper relation to such a case.

The majority opinion seems to carry an assumption that the holder of the patent title, if out of possession, should have his election of two ways in which to test the validity of the tax title, either to bring an action himself within five years from the time of the accruing of the tax title, or to disseize the holder of the tax title, and compel him, if he desires to protect himself, to bring an action within five years from the accruing of the tax title. I think it is sufficient to say that one remedy is enough. But it may also be said that the law will furnish no temptation to any person to commit a wrong.

If the doctrine of the majority opinion is correct, why should the holder of the patent title ever bring an action to recover possession of unoccupied lands? His true policy would be to take possession without action. If the five years had then expired, or should expire before the action to recover possession could be brought by the owner, the disseizor could not be disturbed.

I regret the decision made in this case, not simply because I deem it erroneous, but because through it, as it seems to me, the court has become launched upon a pathless sea of trouble, without chart or compass. What shall the holder of a tax title to unoccupied lands do? Shall he take actual possession? That would not avail him unless he held it, and whether he could hold it would be a mere question of force. In *Lawrence v. Kinney*, above cited, where upon a statute similar to ours, the same construction was sought to be put

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as has been adopted by a majority of this court, that court said: "In such a case it would be reduced to a question of mere physical effort and strength between the parties as to which shall get in first, and maintain possession after he is in, for if once he is dispossessed, and the other comes in, the same consequences ensue." Nor, so far as I can see, would the time ever come after the five years had expired when it could properly be said that the holder of the tax title, if the construction adopted in the majority opinion is correct, could cease to rely upon physical strength. The statute says: "No action \* \* \* shall lie \* \* \* unless brought within five years," etc. The court, in construing the statute, says: "Nothing is said as to possession, but the statutory bar seems to be complete at the expiration of the five years. If, after the expiration of that period, either the purchaser or the owner is compelled to resort to an action for the purpose of vindicating his title or possession, the bar of the statute operates on, and is decisive that the action cannot be maintained." If this is correct, there is no escaping the conclusion that, after five years, physical strength must constitute the sole reliance. In the majority opinion it is denied that the doctrine will lead to such a result. But such a result must follow, or the court must hold contrary to the express language of the statute, or overrule this decision, and say (what I hold to be the correct doctrine) that the statute does not apply to a case of disseizin.

It is held in the original opinion that the statute begins to run against the holder of the tax title from the recording of his deed, because an action by him for the recovery of possession may from that time be maintained. To this it may be said, that if the land is occupied at the time the tax title accrues, the holder may of course have his action to recover possession, and, under such circumstances, his action to recover possession must be brought within five years. So far there is no room for controversy. But the doctrine of the opinion is, that the plaintiff, although constructively in pos-

session, might have maintained an action to recover possession at any time after his title accrued, and that he should not have relied upon his constructive possession, but should have brought an action to recover possession. Whether he should or not, is a question which cannot be properly evaded in this decision. The holder of a tax title should certainly have some way of protecting himself better than by a resort to physical force. Should, then, the holder of a tax title, who has constructive possession, bring an action to recover possession, and would his title be improved if judgment for possession should be obtained? I think not. A person cannot recover what he already has. It is true that a judgment for possession would entitle him to a writ of possession, but such instrument would have precisely the efficacy of so much blank paper so far as any substantial right is concerned. He who has constructive possession may have actual possession upon taking it. But the holder of a title to land, if in constructive possession, cannot obtain even a writ of possession, because he cannot obtain judgment. In a petition in an action for the recovery of real property, the plaintiff must aver that the defendant unlawfully keeps him out of possession. Code, § 3250. To entitle him to judgment against the defendant, that averment must not only be made, but proven. Now as the petition need not be sworn to, the plaintiff could, to be sure, easily perform the farce of averring that the defendant unlawfully keeps him out of possession, but he could not prove it, and the action would necessarily be dismissed at his costs.

It is said that an action may be brought under sec. 3273 of the Code, but this position is, in my opinion, equally untenable. That section provides for an action to quiet title. The petition must state that the petitioner is credibly informed, and believes, that the defendant makes some claim adverse to the estate of the petitioner. Where the petitioner is so informed and believes, there would of course be no difficulty. But how shall the holder of a tax title protect himself when he is not so informed, and does not so believe? He cannot



bring an action to quiet title. He cannot go through the farce of making the requisite averment as in an action to recover possession where the possession is not withheld, because in an action to quiet title the petition must be sworn to.

But suppose that we could surmount this difficulty. Suppose the plaintiff in this case had immediately, upon obtaining his tax deed, brought an action to quiet title, and had obtained a judgment. I fail to see how such an action could be of any benefit to him. Would it stop the statute from running, or launch it from a different date? It is conceded that the plaintiff's title is perfect. It could not then have been made more so if it had been quieted within the five years. Besides, he is held to be barred now because the statute provides that no action to recover possession shall lie unless brought within five years, etc. A judgment merely quieting title before the disseizin should not have the effect to remove the bar. There is certainly not the slightest intimation in the statute that an action to recover possession may be brought after five years, if a judgment quieting title has been obtained in an action brought during the five years, and I am unable to discover upon principle any connection between the two things.

But suppose that a judgment quieting title would prevent an action like the present from falling within the five years' limitation, as I understand the doctrine of the majority of the court to be, against whom should such action be brought? The answer is, of course, against the holder of the patent title. But this cannot always be done, because he cannot always be discovered. Deeds are sometimes left unrecorded; sometimes the owners of lands die intestate, and sometimes, when they die testate, no record of the will, or of the proceedings probating the same, is made in the county where the land is situated. It follows if the doctrine of the majority opinion is correct, that a tax title, however regular it may be, is subject to a grave infirmity. It cannot be relied upon after five years to enable the holder to recover possession if he is ousted,

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unless it has at some time or other been quieted, *and although any number of judgments may have been rendered purporting to quiet it, no one can discover from the record whether it has really been quieted or not.*

The theory, then, that the holder of a tax title to unoccupied land may protect himself by bringing an action to quiet title, before his title is disputed, or by an action to recover possession while he is constructively in possession, seems to me to be subject to insuperable objections, and I reach again the result pointed out in *Lawrence v. Kinney*, above cited, as the consequence of the construction contended for in that case, and adopted in this, that the holder of a tax title, after five years, must rely upon physical force for the protection of his rights.

The construction which I contend for obviates that difficulty, and is supported not only by the decisions above cited, but by *Waln v. Shearman*, 8 Serg. & Rawle, 357.

SEEVERS, J.—In a petition for a rehearing, our attention is called to the fact we have in the foregoing opinions failed to pass upon the point made by the appellant that section 790 of the Revision, and section 902 of the Code, are unconstitutional, if the construction we have placed thereon is correct. As we understand, it is claimed that the construction we have adopted makes the said sections obnoxious to both the Constitution of the United States, and of this State. In this view we do not concur, and therefore overrule the point. The length of the foregoing opinions forbids a statement of our reasons.

Petition for rehearing

OVERRULED.

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Litchfield v. Halligan.

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## LITCHFIELD V. HALLIGAN.

1. **Pleading: REPLEVIN.** In an action of replevin an allegation by the defendant that he purchased the property in controversy of a third party is a sufficient denial of plaintiff's allegation of ownership.

*Appeal from Webster Circuit Court.*

TUESDAY, APRIL 16.

THIS is an action of replevin for seven hundred and forty new oak fence posts, of which plaintiff alleges he is the absolute and unqualified owner, and which, he avers, the defendant wrongfully detains from plaintiff, the alleged cause of detention being that defendant cut the posts on section 1, township 88, range 29, the premises of plaintiff. Plaintiff alleges that the posts are of the value of ten cents each, and that he has sustained damage by the wrongful detention, in the sum of one hundred dollars.

A writ of replevin was issued to the sheriff of Webster county, under which he levied upon, and took from the possession of the defendant, three hundred and ninety-six posts. The defendant, for answer, avers that about the month of February, 1876, the defendant purchased the posts in question from Catherine Kelly, who was then, as the defendant is informed, and so believes, the owner thereof, and as the defendant is informed and so believes, he is the owner of said property absolutely and unqualifiedly. For a second and further defense, the defendant avers: That said posts were cut near the line of sections 1 and 2, in township 88, range 29, Webster county, Iowa, and the said Catherine Kelly, and those under whom she claims, have been in the continuous, open, visible, uninterrupted and peaceable possession of the tract of land on which said posts were cut, more than ten years before this suit was commenced, and more

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than ten years before the posts were cut, and more than ten years before the defendant purchased said posts; that on or about the 9th of February, 1876, the defendant, for a valuable consideration, by a contract not in writing, purchased said posts of said Catherine Kelly; that, by the wrongful suing out of said writ of replevin, and the taking and detention of said property thereunder, the defendant has been deprived of the use of said property, taken under said writ, to-wit: Three hundred and eighty-four posts, the value of which use was and is five dollars per month; said posts were and are of the value of fifteen cents each. The defendant asks judgment for the return of the property, or its value, and for damages for wrongful detention.

The cause was tried by a jury, and a verdict was returned for defendant for three hundred and eighty-four posts of the value of \$48.96. The plaintiff's motion for new trial was overruled, and judgment was rendered for the defendant.

The plaintiff appeals.

*Theodore Hawley*, for appellant.

*O'Connell & Springer*, for appellee.

DAY, J.—I. The court instructed the jury as follows: "The plaintiff claims three hundred and eighty-four posts, which he avers the defendant cut upon his premises described as section 1, township 88, range 29, in this county. The real question in dispute is, whether the posts claimed in this action in plaintiff's petition were cut by the defendant upon the plaintiff's land above described. If they were, your verdict will be for the plaintiff, if not, for the defendant; and it is incumbent upon the plaintiff to establish the proposition—that is, that they were cut, by a preponderance of the evidence." *First*, it is urged that the court erred in instructing the jury that it was incumbent upon plaintiff to prove that the posts in question were cut upon his land. It is claimed that none of the

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replevin.

allegations of plaintiff's petition were denied, and that upon the pleadings plaintiff was entitled to judgment. The plaintiff did not, by demurrer, raise the sufficiency of the answer, nor did he ask the court to direct the jury to return a verdict for plaintiff upon the pleadings. On the contrary, plaintiff treated the answer as sufficient, assumed the burden of proof, and introduced testimony tending to prove plaintiff's ownership of the land described in the petition, and that the posts were cut upon it. The instruction seems to recognize the fact that plaintiff's ownership of the land described is not denied, and to require proof that the posts were cut on this land. The answer in substance alleged that the posts were purchased of Catherine Kelly, who was the owner thereof, as defendant believes. This is equivalent to a denial that plaintiff was the owner of them, and cast upon plaintiff the burden of proving his ownership, which he might do by proving that they were cut upon the land described, his ownership of the land not being denied. *Second*, it is further claimed that the court erred in this instruction in limiting the plaintiff's recovery to three hundred and eighty-four posts. The court told the jury that plaintiff claimed three hundred and eighty-four posts, whilst in the petition plaintiff claimed seven hundred and forty posts. But, as the jury, under the evidence, found that the plaintiff was not entitled to any posts, this error in the instruction worked him no prejudice.

II. The court further instructed as follows: "If some of the posts were cut upon the premises here described, and some were not, the plaintiff will have a verdict for those which were cut there, and the defendant will have a verdict for the remainder. If none of them were cut upon the plaintiff's land, the defendant will have a verdict for the whole, and if the defendant recovers, his allowance will be for so many posts as he is entitled to at their value, and interest at six per cent from the time they were taken on the writ." It is claimed that no evidence was introduced justifying the giving of this instruction. The abstract shows conclusively

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that it does not contain all the testimony. The defendant introduced in evidence a plat of township 88, range 29. The plaintiff objected and excepted to the introduction of this plat. In rebuttal plaintiff introduced the plat book and transfer book, and undertook to explain a discrepancy which existed between the two plats. Neither of these plats is in the abstract. We cannot regard the plat introduced by defendant as having established nothing, since plaintiff excepted to its introduction, and deemed it necessary to offer rebutting evidence. It seems that the posts were cut near the line between sections one and two. It may be that these plats rendered the exact location of the line between these sections so uncertain that it was made doubtful whether the posts were cut on the plaintiff's land. As we have not before us an item of evidence evidently deemed material by the parties, we cannot say that there was no evidence to which this instruction is pertinent.

III. For the reason above considered, we cannot say that the verdict is not supported by the evidence. This disposition of the case renders a consideration of appellee's motion to dismiss the appeal unnecessary. The record does not affirmatively show any prejudicial error.

**AFFIRMED.**

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WOLF V. THE CITY OF KEOKUK.

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109	98

1. **Municipal Corporation: IMPROVEMENT OF STREET: ASSESSMENT.** Under section 466 of the Code, cities are authorized to pass an ordinance assessing upon a corner lot the cost of macadamizing one-fourth of the square formed by the intersection of the streets. ADAMS, J., *dissenting*.

*Appeal from Lee District Court.*

TUESDAY, APRIL 16.

The plaintiff prays for an injunction restraining the city of  
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Keokuk from enforcing against a corner lot, which plaintiff claims to own, the cost of macadamizing one-fourth of the square occupied by the intersection of the street lying in front and along side of said lot. The petition alleges that the lot in question is of the width of fifty feet on Concert street, and of the depth of one hundred and forty feet on Thirteenth street. The answer in substance alleges that the city had Concert and Thirteenth streets macadamized according to law and the ordinances of said city, and by virtue of the same authority the city council levied the assessment set forth in plaintiff's petition; that such assessment was made by apportioning the expenses and costs of said improvement upon the several lots or parcels of land in said blocks in proportion to the frontage of said lots or parcels of land upon said improvement in accordance with the acts of the General Assembly, and the ordinance of said city. The answer further alleges that the lot in question extends to the center of the streets, and that it fronts eighty-three feet on Concert street. A demurrer to this answer was interposed. The abstract does not show that the court ruled upon the demurrer, the only record of the court's action being that the cause came on for hearing on the bill, answer and demurrer, and the court ordered that the bill be dismissed. The plaintiff appeals.

*Sprague & Gibbons*, for appellant.

*Craig & Collier*, for appellee.

DAY, J.—The cause was submitted to the court, and determined upon the pleadings alone. No proof of the ordinance of the city of Keokuk was introduced. The court cannot take judicial notice of the ordinances of a city. *Garvin v. Wells*, 8 Iowa, 286. The answer alleges that the assessment in question was made in accordance with the acts of the General Assembly, and the ordinances of the city. Upon the pleadings we must presume that the assessment was made in accordance with the ordinances of the city. The

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only question fairly presented for our consideration is this: Was the assessment made in accordance with the acts of the General Assembly? In other words, do the general laws of this State authorize a city to provide by ordinance for the assessment upon corner lots of the cost of macadamizing the intersections of streets? In the determination of this question, we attach no importance to the claim of the city that the lots in question extend to the center of the street. The statute provides that the city council, or trustees of any incorporated city or town, whether organized under special charter, or under the provisions of ch. 51 of the Revision of 1860, and the acts amendatory thereto, are empowered and authorized to provide by ordinance for the constructing of the sidewalks, for the curbing, paving, graveling or macadamizing of any street, avenue or alley, or any part of either of the same, and for the constructing of gutters; and such city council or trustees shall have full power and authority to provide by ordinance for the levy of special tax upon the lots or parcels of ground, or any part of either of the same, fronting upon or lying along the street, avenue or alley, which is to be improved, or is improved, for the purpose of defraying the cost thereof. See ch. 45, Laws Fourteenth General Assembly, §§ 1 and 2. This chapter is continued in force as to cities operating under special charters. Section 466 of the Code contains substantially the same provision as to cities incorporated under the general incorporation law. Does this statute authorize the passage of an ordinance for the assessment upon a corner lot of the cost of macadamizing one-fourth of the square occupied by the intersection of the streets? This question involves a determination of the meaning of the words fronting upon and lying along the street. If the streets extend in front and along side of a lot, then the lot may be said to front upon and lie along such streets. We may determine, then, the meaning of these words, by considering the relation of the streets to the lots. What idea is conveyed to the mind when it is said that a lot has a street in front of it, and one along its side? Would not any one



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understand that he might, upon such streets, pass both in front of and along the side of the lot without going off of the streets? Would any one expect to find such a lot with streets stopping short at the corner, leaving a square piece of the dimensions of the width of the streets, not included within any street, and over which he could not go without a trespass? We are satisfied that such a construction would do violence to the usual understanding of the import of the terms referred to. The Revision, § 29, provides that words and phrases shall be construed according to the context, and the approved usage of the language. We think that the words fronting upon and lying along a street, as employed in the statute under consideration, mean that the lot is so situated, with reference to the streets, that it is readily accessible upon the front and the side. This meaning includes the idea that the intersection at the crossing of the streets includes the part of the street which the lot fronts and lies along. It is necessary, in the construction of this act, to include the idea of breadth. It will not do to limit the street to a mere line. The statute authorized the passage of an ordinance for the imposing of the assessment in question.

The court did not err in refusing to grant the injunction.

**AFFIRMED.**

ADAMS, J., *dissenting*.—It is not provided that there shall be assessed upon each lot the cost of improving that part of the street which is in front of it. To my mind, the meaning of the statute is, that the cost of the entire improvement shall be assessed upon the lots which front upon the improvement. According to this view the cost of improving the square at the intersection is to be distributed. It is a part of the street, and being such, the cost of improving it may be assessed upon lots fronting upon the street. If this view is not correct, I think the cost would fall upon the city, for I do not think that a lot can be said to front upon a square upon which it merely corners.

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Burlington & Henderson County Ferry Company v. Davis.

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**BURLINGTON & HENDERSON COUNTY FERRY COMPANY v. DAVIS.**

1. **Municipal Corporation: POWER TO LICENSE.** While the exclusive power conferred upon a city to grant a license does not authorize it to grant an exclusive license, yet such power is conferred when it is authorized to grant or refuse a license.
2. ———: ———: **FERRY.** It is competent for the Legislature to confer upon a city the right to grant an exclusive license to ferry across the Mississippi river.

*Appeal from Des Moines District Court.*

TUESDAY, APRIL 16.

ACTION to enjoin the defendant from operating a ferry across the Mississippi river, between the city of Burlington and the opposite shore. The plaintiff claims the exclusive right to operate a ferry across the Mississippi river at the city of Burlington. It predicates such right upon an ordinance of the city, the first and second sections of which are in the following words:

"SECTION 1. *Therefore, be it ordered by the City Council of the City of Burlington.* That in consideration of the premises, the right to establish and maintain a ferry across the Mississippi river, between this city and the opposite shore in the State of Illinois, is hereby granted to said 'Burlington and Henderson County Ferry Company,' for the term of ten years from this date, without charge for wharfage or other tax, license or assessment against the company; *Provided,* said ferry company shall, in all other respects, comply with the provisions of Ordinance No. 14 of the Revised Ordinances of this city, entitled 'Ferries,' during said term of years. If the said ferry company fails to run their boat for ten days, when the river is navigable, all the above privileges shall be forfeited; but in case of breakage a reasonable time shall be given for repairs.

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"SECTION 2. That the rights and privileges granted to said Burlington and Henderson County Ferry Company are exclusive, and no other license to run a ferry across said river shall be granted by the city of Burlington to any other person, company or body corporate for the term of ten years from this date; *Provided*, said Burlington and Henderson County Ferry Company shall comply with the conditions and restrictions of said Ordinance Fourteen of the Revised Ordinances of the city, entitled 'Ferries,' or other ordinances hereafter adopted for the regulation of ferries."

The defendant does not deny the existence of such ordinance, but claims the right to operate a ferry notwithstanding it. His right is predicated upon the fact that he is duly licensed under the Laws of Illinois, and by the proceedings of the proper court of Illinois. He denies that the city council of Burlington have the power to exclude him from such right. He sets up also by way of defense that the plaintiff has violated the terms of the ordinance and forfeited its rights thereunder. The plaintiff demurred to the defendant's answer, and the demurrer was sustained. The defendant appeals.

*Hall & Baldwin and Blake & Hammack*, for appellant.

*J. & S. K. Tracy and P. Henry Smyth*, for appellee.

ADAMS, J.—The city council has only such power as has been given it by the Legislature. To determine whether the power to grant an exclusive right to operate a ferry at the point mentioned has been given, we have to inquire whether any act has been passed purporting to give such power, and if so, whether the Legislature had power to pass such act.

The act of the Legislature upon which the plaintiff relies is found in the charter of the city of Burlington, approved June 10, 1845. Section 15 of the Charter provides that "the city council shall have power, and it is made their duty to regulate by good and wholesome laws and ordinances, all fer-

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ries across the Mississippi river from said city to the opposite shore. And the said city council shall have full and exclusive power to grant or refuse license to keepers of ferries from said city across the Mississippi river to the opposite shore."

The defendant denies that the charter purports to confer upon the city council the power to exclude him from the operation of his ferry. In the first place it is said that the charter purports to grant the exclusive power to license ferries, but not the power to grant an exclusive license to a ferry. In the second place it is said that the power granted is to license ferries *from* the city, and that even if the city council had the power to grant an *exclusive license* to ferry *from* the city, such license would not exclude the defendant's right to ferry from the opposite shore.

As to the first point, it may doubtless be said that the exclusive power to grant a license is not the same as the power to grant an exclusive license. By granting the exclusive power to license, the Legislature doubtless designed to provide that the city alone should exercise such power. *Fanning v. Gregoire*, 16 Howard, 524. The power to grant an exclusive license must be found, we think, if at all, in other words of the charter. Upon looking into it, we find that it conferred the "power to grant or refuse license." Herein, we think, was conferred the power to grant an exclusive license. The power to license necessarily includes the power to prohibit unlicensed persons from doing the acts authorized by the license. The power to refuse license necessarily gives the power to limit the issuance of licenses. And if the city council has power to limit the issuance of licenses, we see no reason why it may not, in its discretion, and with a view to promoting the public interest, bind itself by contract with a person licensed to issue no other license.

The mere power to license, or to license and regulate, does not, it seems, include the power to create a monopoly. *Chicago v. Rumpff*, 45 Ill., 90; *Logan & Sons v. Pyne*, 43 Iowa,

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524. In the latter case, a city ordinance was held void, which was made to confer upon the plaintiffs the exclusive right to run an omnibus line. The power to license useful occupations is conferred upon a city council to enable it the better to regulate the mode in which the occupations should be exercised. For the purpose of such regulation, any reasonable restrictions may be imposed; but the exercise of the occupation must be open to all who are willing to comply with the terms and conditions. *Chicago v. Rumpff*, above cited. This is the rule where the mere power to license is conferred. But where the power to refuse licenses is conferred, we think that such rule is not applicable.

We come next to consider that the charter purports only to confer the power to license ferries *from* the city to the opposite shore.

The defendant claims that he does not need a license from the city, because his ferry is not maintained from the city, but from Illinois. He claims that the right which the plaintiffs can exercise under the charter is different from the right which he seeks to exercise, and that the plaintiff's license, therefore, does not exclude him.

The Legislature, in conferring upon the city council of Burlington the power to license ferries from the city, conferred all the power in that respect which it possessed. It could not give any rights upon the Illinois shore. *Weld v. Chapman*, 2 Iowa, 524; *Gear v. Gear*, 34 Ill., 74. For the same reason the defendant, under the laws of Illinois, could acquire no rights upon the Iowa shore. The fact, then, that the Legislature did not confer more power, is not an indication that it did not intend to confer the power to exclude persons licensed merely under the laws of Illinois. We must then hold that the plaintiffs' license is exclusive, unless the rights conferred by it are different from those which the defendant seeks to exercise; and upon this point we have to say that we do not think that they are. The plaintiffs are operating a ferry between the city of Burlington and the opposite shore,

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and the defendant, until he was enjoined, was doing the same thing.

If the license is not exclusive, it must, we think, be for want of power in the Legislature. The defendant insists that there is such want of power. Upon this point he says that "the Mississippi river, being a free navigable stream, vessels may land at and discharge passengers at any point between high and low water mark, for that they have the same right to touch and make fast at and between these limits, which are a part of the river, that they have to float or anchor in mid stream."

Grants of exclusive ferry licenses, however, are upheld. They rest upon peculiar ground. A ferry is in some sense an extension  
 2 —: —: of a public road. Whatever objection there may  
 ferry. be to the creation of a monopoly, it is considered as overcome in the matter of a ferry by the consideration of the public necessity or advantage. In *Cooley on Constitutional Limitations*, 593, the author says: "The States may lawfully establish ferries over navigable waters, and grant licenses for keeping the same, and forbid unlicensed persons from running boats or ferries without such license. This also is only the establishment of a public highway, and it can make no difference whether or not the water is essentially within the State, or, on the other hand, is a highway for inter-State or foreign commerce." The author cites, in this connection, *Conway v. Taylor's Executors*, 1 Black, 603; *Chilvers v. People*, 11 Mich., 518; *Fanning v. Gregoire*, 16 Howard, 524. In *Conway v. Taylor's Executors*, above cited, it was held that the authority to establish and regulate ferries is not included in the power of the Federal Government to regulate commerce, under the Constitution of the United States. In *Chilvers v. People*, above cited, the court said: "Ferries are as clearly creatures of local legislation as roads and bridges; and the establishment and regulation of them are as necessary for the convenience of the traveling and business public." In *Jones v. Fanning, Morris*, 348, a

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question arose in regard to the power of the Legislature to grant an exclusive license to ferry across the Mississippi river at Dubuque. The court, after considering the objections urged against the existence of such power, said: "The conclusion to which we are brought on this subject is that the Mississippi river, so far as it affords facilities for transportation, cannot be obstructed or monopolized. It is a common highway and forever free. But, so far as it presents an obstruction to land carriage, it is left to the sound discretion of the Legislature to provide means for surmounting such obstructions by means of ferries, and for this purpose it may even give individuals exclusive privileges, within reasonable limits, when done in good faith, for the purpose of furnishing an indispensable link in the chain of transportation on dry land." Since this decision a large number of exclusive ferry licenses have been granted in this State, and we are not aware that the power of the Legislature has been questioned in this respect, from the time of that decision until it was done in this case.

The point is made, however, by the defendant, that since the decision in *Jones v. Fanning*, a restriction has been imposed upon the power of the Legislature in this respect. We are referred to art. I, sec. 6, of the Constitution of the State. That section provides that "the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not belong equally to all citizens." The effect of this restriction we need not consider further than to observe that it has no application to the charter in question, unless the constitution is retroactive. The charter antedates the constitution. As to the operation of a constitution it is said in *Cooley on Constitutional Limitations*, 63: "We shall venture to express the opinion that a constitution should operate prospectively only, unless the words employed show a clear intention that it should have a retrospective effect." The learned author, in the same connection, after commenting upon the rule in regard to the operation of

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statutes, says: "We are aware of no reasons applicable to ordinary legislation, which do not, upon this point, apply equally well to constitutions." A similar view seems to have been taken in *Albyer v. State*, 10 Ohio N. S., 588. We are of the opinion that the provision of the charter in question did not become void upon the adoption of the constitution with the restriction referred to.

One question remains to be considered. The ordinance under which the license is derived provides that if the ferry company fails to run its boat for ten days, when the river is navigable, all privileges shall be forfeited. The answer avers that the plaintiff has neglected for periods of from six weeks to two months, and at various times, to operate its boat; and trade and travel have been driven from the city; and the ferry has not been run for the accommodation of the public, but at the whim of those in charge. The answer, however, does not aver that the plaintiff neglected to run a boat for ten days, when the river was navigable. It is not shown to us, then, that anything has transpired by reason of which, under the ordinance, a forfeiture could be declared.

We think that the demurrer to the defendant's answer was properly sustained.

**AFFIRMED.**



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Ahern v. The Dubuque Lead and Level Mining Company.

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## AHERN V. THE DUBUQUE LEAD AND LEVEL MINING CO. ET AL.

1. **Mines and Mining: DRAINAGE: CONSTITUTIONAL LAW.** Section 1229 of the Code, providing that any person who shall by drains or adit levels, rid lead-bearing mineral lands of water, making them productive or available for mining purposes, shall be entitled to receive one-tenth of all the lead mineral taken therefrom, is not in conflict with the constitution.

*Argument 1.* The statute is identical in principle with those regulating party walls and partition fences, and provides only that one should compensate another for outlays lawfully made by which he himself has been benefited.

*Argument 2.* The act of building the adit is lawful, because it tends to promote the public interest, and is productive of public good. ROTHROCK, Ch. J., and SEEVERS, J., *dissenting*.

*Appeal from Dubuque District Court.*

TUESDAY, APRIL 16.

THE petition alleges that plaintiff is the owner of certain mineral lands, and leased the same to the defendant, the Dubuque Lead and Level Company, on condition of receiving one-fifth part of all mineral raised; that defendant has raised a large amount of lead ore, and that plaintiff is entitled under the law to recover the value of one-fifth thereof. Defendant Chamberlain intervened in the action, and answered the petition, alleging that "he is now, and previous to the time of raising the mineral claimed by plaintiff he was, the owner of an adit level running through the premises of plaintiff, made for the purpose of draining the mineral lands through which it runs, including the lands of said plaintiff; that by said level the lands of plaintiff were drained of water, and by reason thereof the mineral \* \* \* \* \* was obtained and raised, and the lands rendered productive and available for mining purposes, and under the laws of Iowa this defendant, as the owner of said level, is entitled to one-tenth of the mineral."

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A demurrer to this answer was overruled, and from the decision thereon plaintiff appeals.

*Wilson & O'Donnell and Griffith & Knight*, for appellant.

*Shiras, Van Duzee & Henderson and Fouke & Lyon*, for appellee.

BECK, J.—I. The questions raised by the demurrer involve the constitutionality of the statute under which defendant claims to recover one-tenth of the mineral as owner of the adit level. Our attention, therefore, is directed to the consideration of that statute, which is as follows, being Code, § 1229:

“Any person or corporation, who, by machinery, such as engines or pumps, or by making drains or adit levels, or in any other way, shall rid any lead bearing mineral lands or lead mines of water, thereby enabling the miners and owners of mineral interest in said lands to make them productive and available for mining purposes, shall be entitled to receive one-tenth of all the lead mineral taken from said lands, as compensation for such drainage.” The three following sections prescribe the remedy that may be pursued to recover the mineral, or the value thereof, by the person or corporation draining lands as contemplated by this section. Two sections next following give the right of way for the purpose of carrying the water away from the mineral lands, and provide for the means of determining the compensation to be paid the land owner.

1. MINES and  
mining: drain-  
age: constitu-  
tional law.

Plaintiff insists that this statute is unconstitutional, in that under its provisions a citizen may be deprived of his property without due process of law, and his property may be in a compulsory manner taken by another for private purposes.

Certain familiar principles applicable to the judicial interpretation of the constitution may properly be stated here. They demand, for their support, neither the citation of authorities nor argument, for they are familiar to the profession.

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Courts will declare statutes unconstitutional only in cases that are free of well founded doubts. If a statute be capable of a construction that will remove constitutional objections, it will be adopted instead of a different construction which would bring the law in conflict with the constitution. If a statute have different provisions, some of which are unconstitutional, and others constitutional, the latter will be supported and enforced. So if separate provisions of a statute, or separate statutes in *pari materia*, are not all constitutional, those which are will be enforced.

It is argued that those provisions of the Code conferring upon the owner of an adit level the right to take and condemn the right of way over lands, and to construct shafts and air holes, are in conflict with the constitution under prior decisions of this court. It is unnecessary to enter into an inquiry upon the question here raised. The pleadings do not show that defendant is attempting to enforce the authority conferred upon him under the section of the Code referred to; nor does it appear that he ever has exercised, or attempted to exercise, that authority. The pleadings show that he is the owner of an adit level. If he, in connection therewith, has any right of way, we will presume that it has been lawfully acquired in some other way than by condemnation under the statute, if that be unlawful. It, therefore, clearly appears that no question involving the validity of the provisions of the statute authorizing condemnation of right of way is in this case.

II. The only question in the case involves the validity of section 1229, above quoted. We will briefly proceed to consider its provisions with a view to determine its constitutionality. It authorizes the owner of an adit level to recover a compensation for the benefit his outlay of money and exercise of skill have bestowed upon owners of mines. The work resulted in freeing the mines of water, which had rendered them valueless. It was intended for his own benefit, but so intimate were the relations between his property,

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whereon the work was done, and the property of the person benefited, that it could not be constructed for his own purposes without conferring benefit upon the other. The mine-owner avails himself of the skill and work of the owner of the adit, and raises mineral. *Ex æquo et bono*, he ought to render compensation to the owner, whose outlays have enriched him. The common law will not give to the owner of the adit a remedy. The statute in question does. We are utterly unable to discover any particular where it is in conflict with the constitution. It is identical in principle with the statute regulating party walls and partition fences, and is not unlike the statutes relating to the drainage of swamp and coal lands, and the change of water courses. The statutes applicable to lost goods and rafts, and vessels adrift, involve the same principles.

The foregoing remarks contemplate the case of the owner of the adit level holding lands other than by condemnation, under the provisions of the Code above referred to, and that he owns, or is a lessee of the land, or in some other way acquired the right to construct the adit. The case presents this aspect, for, as we have before said, the pleadings do not show how defendant acquired the possession of the land upon which his work is situated. We are required to presume, in the absence of a showing to the contrary, that he acquired it lawfully. If he could not acquire it under the statute, then we must presume he did not.

The objections to the validity of the statute urged upon our attention are indefinite, and rather present general thoughts as to the sacredness of private property and rights, which the law protects, than point out how these are interfered with in an unconstitutional manner by the statute in question. It is said an adit was constructed without plaintiff's knowledge and consent, and its owners are now claiming to take plaintiff's property without his consent. The first statement of this proposition may be admitted as true; the second cannot be. The plaintiff is not compelled to work

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his mine drained by the adit. If he does, the law requires him to render one-tenth of the ore, or its value, as compensation for the benefits he derives from the adit. There is no taking of private property, but the recovery of compensation for benefits rendered. It is an entirely voluntary matter with the plaintiff to work his mine, and thus be brought under obligation to render compensation to defendant. The law presumes he consents to rendering the compensation when he avails himself of the benefits for which the law declares he shall render compensation. The fact that the adit was constructed without plaintiff's knowledge and consent in no manner affects his rights. A bridge or a mill is built without the knowledge or consent of those who use it, yet when a man crosses the one or has his grain ground at the other, he is under obligation to pay the tolls fixed by law.

It is urged, against the validity of the statute, that it fixes the compensation to be rendered to the owner of the adit. It is insisted that this invalidates the statute. It is claimed that the compensation ought to be determined by a court and jury, or the Legislature ought to provide some other tribunal to assess the compensation to be paid for the benefits received from the adit. This position does not deny the right of the Legislature to provide for the recovery of compensation, but assails the statute as unconstitutional, on the ground that the compensation is fixed by the Legislature itself. The objection is most manifestly unsound. The Legislature can fix the tolls to be charged by mill owners, and the owners of bridges; the charges to be made by the owner of wharves, docks, elevators, etc., and can prescribe a tariff of freights to be charged by railroad corporations. It is not claimed that a court and jury, or other tribunal, shall be called upon to determine the compensation to be charged in such cases. *Dubuque v. Stout*, 32 Iowa, 80; *Dubuque v. Stout*, Id. 47; *Munn v. Illinois*, 4 Otto, 113; *C. B. & Q. R. Co. v. Iowa*, Id. 155; *Peik v. C. & N. W. R'y Co.*, Id. 164; *Winona & St. Peter R'y Co. v. Blake*,

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**Id. 180.** These cases, so far as they involve legislative power, are not different from the one before us.

It is said, with earnestness indicating alarm, that if the Legislature may prescribe one-tenth it may one-half, or the whole of the mineral raised by the owner of a mine, compensation to be paid to the proprietors of the adit. It is not at all permissible for the courts to rob other branches of the government of their constitutional authority, on the ground of a fear that in some imaginary case the power may be oppressively exercised. We must presume that legislative authority will always be fairly, justly and constitutionally exercised. The Legislature has authority to determine the compensation to be given the owner of the adit; the courts must presume the determination is just.

The cases above cited abundantly support the position that if the Legislature possesses the power to authorize the owner of the adit to collect a compensation from those benefited by the work, and impose an obligation upon the person benefited to pay, it has the authority to fix that compensation.

It is said that the statute, in providing a per centum of the mineral as a compensation, cannot operate justly or equally in all cases, for the compensation ought to be greater in some cases than in others. This may all be admitted. The doctrine, if adopted by this court, would lead us to hold the statutes authorizing fixed rates of tolls for ferries and bridges, those providing for tolls to be collected by mill owners, and those fixing compensation for recovery of rafts and vessels adrift, all unconstitutional. In some cases, the persons receiving compensation would realize more for their outlays and labor than would be received in other cases. But these statutes have never been assailed on this ground. No case can be found where a court has refused to support a law on the ground that it operated unjustly in some cases—was not so framed that it would have an equal operation in all conceivable cases. The courts inquire whether the Legislature has

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the authority to enact a statute. If the power is found, they do not inquire into its operation, and hold it void because of some imaginable inequality that may occur in its enforcement. But we have devoted more time to this branch of the case than it merits.

III. It is said that the pleadings do not show that the owner of the adit constructed it for the purpose of raising mineral from his own land; that unless he holds an interest in mineral he could not have such community of interest as would make the plaintiff liable to him for compensation on account of the benefit enjoyed.

This point was not made in the court below, and cannot really arise upon the record. The demurrer to defendant's answer was based upon the ground, and no other, that the act under which defendants claim the mineral is unconstitutional. The extent or nature of defendant's interest in the mineral affected by the adit, or whether he had or had not any such interest, were not matters alleged or denied by the pleadings preceding the demurrer. The objection under consideration goes to the rights of defendant under certain conditions—that is, he can have no right which a court will enforce, unless he has an interest in the mineral affected by the adit. This, it will be at once seen, involves a matter of fact. No such fact is presented or denied in the pleadings, and the absence of allegations in respect to it is not a ground of demurrer. There can exist no reason for disturbing the decision of the court below, whatever conclusion we may reach upon this point.

In view of the fact that the point has been fully discussed by counsel of both parties, we present briefly our conclusions thereon.

As we regard the law, defendant's rights cannot be based on any community of interest between him and plaintiff, but rather upon the fact that plaintiff is benefited by a work which it was lawful for defendant to do, that is, a work hav-

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ing for its object the draining of all mines generally in that locality.

Is such a work for such an object lawful? We cannot doubt that it is, for this reason: It bestows benefits upon owners of mines, by enabling them to obtain valuable metals that were before inaccessible; it restores, as it were, to them their property. In this view the adit owner acts the part of the finder of lost property, or of one who takes a vessel adrift. Surely the statute which enforces compensation from the owner that has been benefited cannot be unconstitutional. It is identical in principle with the statute relating to lost goods and watercraft. If there was no statute on the subject, it cannot be doubted that one, by means of an adit, might lawfully drain all the mines in his neighborhood. The owners, *ex bono et æquo*, ought to compensate him. But, in the absence of a statute, he cannot recover compensation. The section of the Code cited is intended to compel the mine owners to do that which, in good conscience, they ought to do.

The act of building an adit is lawful, for the reason that it is a matter of public interest, and of great public good. To develop wealth, by uncovering the mines of rich metals, tends to promote public prosperity.

We conclude that, however obnoxious the other provisions of the Code relating to the rights of the owner of an adit may be, the section authorizing him to recover compensation from the owners of mines, for the benefits they have received from his skill and outlays, is not unconstitutional. Surely we may hold it is not so plainly and palpably in conflict with the supreme law of the State, and upon the question there is not such absence of doubt that we are required to hold it invalid.

**AFFIRMED.**

**ROTHROCK, CH. J., dissenting.**—Believing that the foregoing opinion is fundamentally wrong, and that the principles



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therein announced, if carried to their logical results, will seriously impair the property rights of the citizen, I will as briefly as can be done, consistent with the importance of the question involved, give the reasons for my dissent.

The provision of the Constitution of this State, that "no person shall be deprived of life, liberty, or property, without due process of law," is substantially the same as that contained in the amendments to the Federal Constitution, and in the constitutions of the several States. These provisions are familiar, not only to the legal profession, but to the public at large, and are justly regarded as the great safeguard of the liberties of the people. "In *Magna Charta* they were wrested from the King as restraints upon the power of the crown. With us they are imposed by the people as restraints upon the power of the Legislature." If disregarded by the courts, the life, liberty, and property of the citizen are at the mercy of arbitrary power. It may seem that these remarks betray unnecessary alarm in view of the small importance to the public of the question whether appellant in this case shall deliver to appellee one-tenth of the lead ore raised from the mine upon appellant's land. But when the principles of the foregoing opinion come to be applied to other, greater, and more varied interests affecting the public at large, it will, in my opinion, be just cause for serious apprehension.

What is "due process of law?" It is properly defined as "Law in its regular course of administration through courts of justice." Bouvier's Law Dic., Vol. 1, 512; Story on the Const., 264, 661; 18 Howard, 272; 13 New York, 378.

It does not mean the act of the Legislature which deprives the citizen of his life, liberty, or property. If such is its meaning, a fair construction of the constitution would be, that no person should be deprived of these rights, unless the Legislature should pass a law taking them away. This would be an absurdity, and with such construction the constitutional limitation of power would be a barren ideality, utterly meaningless.

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It is said in the majority opinion that the statute in question is identical in principle with the statute regulating party walls and partition fences, and is not unlike the statutes relating to the drainage of swamp and overflowed lands, and the change of water courses.

As I read these statutes they are wholly unlike the one under consideration, so far as the authority or power attempted to be exercised by the Legislature is involved. In each and all of them, the Legislature has provided a tribunal clothed with judicial power, to determine what the owner of the property shall pay for the benefits received. What would be thought of these statutes if their provisions should arbitrarily fix the value of a brick partition wall at so much per foot, or the value of a partition fence at so much a rod, or, to make an illustration more pertinent to the question before us, require the owner of land reclaimed by a drain or ditch, to give to the proprietor of the drain or ditch one-tenth of the corn grown upon the land, without regard to the value of the corn, or the cost of constructing the ditch, and without regard to whether the owner of the land consented to the making of the ditch or drain? With due deference, I submit that if legislation of the character supposed is not depriving the citizen of his property without "due process of law," then it is competent for the Legislature to enact that a person may become indebted without his consent, and require him to pay the debt in property at a certain fixed and arbitrary value.

The majority opinion also likens the law in question to the statutes applicable to lost goods, and rafts and vessels adrift. It must be admitted that these statutes are in principle the same, with this important exception: The finder of lost property, and one who takes a vessel adrift, is, under the statute, entitled to a percentage of the value of the property, while in the statute under consideration, one who constructs an adit level is entitled to one-tenth in kind of the mineral reclaimed, without regard to its value. This titling is required to be paid as long as the mine shall be worked, without regard to the

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rise and fall in the market price of the mineral. I know of no case where the question as to the validity of the statutes applicable to lost goods and vessels adrift has been raised, but in so far as they attempt to fix an arbitrary compensation to the finder, I think they are void.

The opinion further holds that the objection that the Legislature has no power to arbitrarily fix the compensation is most manifestly unsound, because it has been held that the Legislature may fix the tolls to be charged by mill owners, and the owners of bridges, the charges to be made by the owners of wharves, docks, elevators, etc., and can prescribe a tariff of freights to be charged by railroad corporations.

All this must be admitted, and yet I think these powers of the Legislature are based upon a different principle from the statute under consideration. They are intended to protect the public against exorbitant and unreasonable charges made by powers and corporations, who have a monopoly of certain lines of business, and to fix a limit beyond which they shall not charge for certain services. They do not exact anything from the citizen without his consent. By such legislation no person is required to take his grain to a mill, or his freight to a railroad. He can use his own property as he sees proper, and no one, without his act, has the right to demand one-tenth, or any part of it. In the case at bar, the owner of the land, whose right to the sole and exclusive possession extends to the center of the earth, is required to deliver one-tenth in kind of his mineral, without regard to its value, to some one who has drained his land without his consent. He must either do this or cease to use his own property in his own way. He is told if he digs in his own soil, and piles up the earth on his own land, he must deliver to another one-tenth of the fruits of his labor, for a benefit to the land, by reason of the drain, and his lips are sealed against disputing the justice of the compensation. I deny that another can be empowered by the Legislature, without his consent, to construct a drain,

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and then control the exercise of his rightful dominion over his own land, by requiring him to pay tithes.

The majority hold that the Legislature has the authority to fix the compensation to be given to the proprietor of the drain, at one-tenth of the mineral reclaimed and raised, and the courts must presume the determination of the Legislature is just. Suppose that the statute required appellant to give one-half, or all the mineral raised. As, in the opinion of the majority, the power to fix the amount is in the Legislature, must the courts still presume that the determination of the Legislature is just? At what point, in the exercise of this power, may this presumption become disputable?

If the power be conceded to be in the Legislature, and the courts must presume it has been justly exercised, there is no middle ground between a reasonable compensation and total confiscation. Just compensation, and that only, can be recovered, and this case be determined by a judicial tribunal, and in no other constitutional manner.

SEEVERS, J., concurs in this dissent.

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118	471

1. **Attachment: LIEN: FOREIGN JUDGMENT.** By the levy of an attachment a party acquires a lien on real estate of which he cannot be divested without his voluntary act or day in court, and such lien will not be affected by a decree subsequently rendered in a court of another State, in a proceeding to which the attachment plaintiff is not made a party.

*Appeal from Hardin District Court.*

TUESDAY, APRIL 16.

THE plaintiff commenced in the Hardin District Court an action at law against the defendant, Geo. W. Harn, to re-

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cover damages for an alleged breach of contract. An attachment was issued therein, and certain lands were attached as the property of said defendant.

The intervener filed in said action a petition of intervention, in which she claimed the said land belonged to her, and asked that her rights thereto be adjudicated. The plaintiff answered said petition, substantially denying the several allegations therein. The defendant, Geo. W. Harn, failed to appear in the main action, and judgment was rendered therein against him, and the cause continued for the purpose of determining the issue between the plaintiff and intervener. Such issue was by the court below found for the plaintiff, and it was adjudged he had a lien on the attached property, from the time it had been attached, and the same was ordered to be sold. The intervener appeals.

*Porter & Moir*, for appellant.

*T. Brown and Huff & Reed*, for appellee.

SEEVERS, J.—It is exceedingly doubtful whether there can be a trial *de novo* in this court, but as the cause can be satisfactorily disposed of by so regarding it, we shall so hold.

The undisputed facts are that George W. Harn, the defendant's ancestor, was the owner of the legal title of record to the lands in controversy. He died, leaving the defendant, his brother, and their mother his sole heirs at law. As such heir, the defendant was the owner of the undivided one-third of said lands on the 23d day of October, 1874, when they were duly and legally attached as his property. Notice of the pendency of the action in which the attachment was issued, however, was not served on him until January 1, 1875, in the State of Ohio.

On the 21st day of November, 1874, the intervener commenced an action in the court of common pleas for Wayne county, Ohio, against the defendant and his brother, in which she alleged the lands in controversy were purchased by

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her deceased husband with her money, and the title taken in his name in trust for her, and that the lands descended to the defendant and his brother charged with a like trust, and she asked that they, by the decree of said court, be required to convey to her. Such a decree was entered by the Ohio court on the 14th day of January, 1875. To this action the plaintiff was not made a party.

The court below rendered judgment against the defendant, and therefrom he has not appealed.

The appeal of the intervener brings before us the single question whether the judgment of the court below, determining that plaintiff has a valid and subsisting lien on the property in controversy from the time the same was attached, is correct, or whether, as between the plaintiff and intervener, the latter is the owner of the property. The intervener insists :

I. That as plaintiff's action was *in rem* in which he sought to subject the lands to the payment of his judgment as the property of the defendant, and as the intervener claimed to own said lands, no judgment should have been rendered against the defendant before the cause was ready for disposition as to the intervener. In support of this proposition *Pierson v. David*, 4 Iowa, 410, and *Curtis v. Smith*, 42 Iowa, 665, are cited. The cases cited were of an equitable character, while the plaintiff's action was of a purely legal nature, and the action of the court, in rendering judgment against the defendant, in no manner prejudiced the intervener.

Besides this, we are unable to find any objection was made in the court below to its action. Certainly no exceptions were taken to such action, and it cannot be raised for the first time here.

II. That the court erred in holding that the attachment created a lien on the property in controversy as against the intervener. As the defendant was the owner of the legal title at the time the attachment was levied, the burden of proof was cast on the intervener, and it was for her to show to the satisfaction of the court

1. ATTACH-  
MENT: Lien:  
foreign judg-  
ment.

that she, in fact, owned the property. For this purpose she introduced in evidence the decree of the Ohio court. Between her and the defendant such decree constituted ample proof that she was such owner, and between them it has the same force and effect as in the State of Ohio.

The plaintiff, by the levy of the attachment, had a lien on the property if it belonged to the defendant, or on any interest he had therein. It was entirely competent for the intervener to show he had no such interest. But the lien of the plaintiff was a vested right or interest, of which he could not be divested without his voluntary act, or having his day in court. This he never has had, so far as the Ohio decree is concerned. If it constituted any evidence against him, it was conclusive, and no amount of proof he could introduce contradictory thereto would be of avail. The Ohio decree, if introduced as evidence in the courts of that State against the plaintiff, would have no more force and effect than so much blank paper.

Unquestionably the plaintiff, by the levy of the attachment, obtained nothing, unless the defendant had an interest in the property attached. This is not disputed. But the point is, has it been so established?

The Ohio decree has not as against the plaintiff even a tendency in this direction. If the evidence before the Ohio court had been introduced below, and the plaintiff had been unable to offer any evidence contradictory thereto, it is exceedingly probable the decision of the court below would have been in accord therewith. The plaintiff's right to cross-examine the witnesses of the intervener, and object to the admission of improper evidence, was full, perfect, and complete, and he cannot, without his consent, be deprived of such right.

There was no other evidence introduced tending to prove the intervener's ownership, except the declarations of the defendant. These, it is claimed, were made to the plaintiff and others. As to the latter, there was nothing to show the plaintiff had any knowledge thereof until after the levy of the

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Thompson v. Winnebago County.

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attachment. Be this, however, as it may, titles to real property cannot be established in that way. If what is claimed by the intervener had been established in a legal and competent manner, her right is better than that of the plaintiff, and notice to him before the levy of the attachment was not required to protect such right. The whole trouble with the intervener was, in a nutshell, that there has been a failure of proof on her part.

Many authorities have been cited by counsel. We deem it unnecessary, however, to refer to them. The principles which underlie this cause are elementary and well understood.

AFFIRMED.

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## THOMPSON ET AL. V. WINNEBAGO COUNTY ET AL.

1. **Practice in the Supreme Court: PRESUMPTION.** It will be presumed, in the absence of evidence to the contrary, that an order of the court below was sustained by sufficient proof.
2. **Administrator: GOOD WILL.** The book of a land and tax-paying agent, containing the names and addresses of his correspondents, constitutes the good will of his business, and his administrator may be required to return it as assets of the estate

*Appeal from Winnebago Circuit Court.*

WEDNESDAY, APRIL, 17.

THE appellees are creditors of the estate, and, as such, filed a motion in the Circuit Court stating that the deceased, at the time of "his death, was acting as a land agent, paying taxes, selling lands, etc., for non-residents and others, and kept a book containing a list of the names and addresses of correspondents and persons whom he did business for as a land agent, and such names and addresses constituted the good will of such business, and, by reason thereof, is of the value of one



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 Thompson v. Winnebago County.
 

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thousand dollars," and they asked the court "to require the administrators to inventory and return the same as assets of the estate." The court made the order, and the plaintiffs appeal.

*B. F. Hartshorn*, for appellants.

*Ransom & Olmsted* and *Bush & Bush*, for appellees.

SEEVERS, J.—Both the abstract and arguments of counsel are exceedingly brief. The order of the court is as follows: "The administrators are ordered \* \* \* to inventory and return as assets of the estate \* \* a certain book containing a list of names and addresses of persons and correspondents, together with the good will of the business of deceased as a land agent. The same to be assets subject to sale." We have no knowledge what facts were before the court at the time the order was made, except as appears therein. So far as we can judge, the matters stated in the motion were in no manner controverted. The presumption is there was sufficient evidence before the court to justify the order. The rule is well established that error must affirmatively appear. It must be presumed the list of names and book containing the same were of the value of \$1,000, and that the same was the property of the estate.

The book clearly was property and so was the list of names, because it required time and care to compile it, and the finding of the court that it was of value and belonged to the estate is conclusive, because we do not have the evidence before us, and error cannot be presumed.

Besides this, we do not know that there are any parties plaintiff other than the administrators. There is nothing to indicate there is any one making an adverse claim to this property and why the administrators should object we are at a loss to imagine.

**AFFIRMED.**

INDEPENDENT SCHOOL DISTRICT NO. 8 OF BURR OAK TOWNSHIP  
v. INDEPENDENT SCHOOL DISTRICT OF BURR OAK.

1. **School District; ORGANIZATION OF INDEPENDENT DISTRICT.** Where the board of directors had in due form created a sub-district, and then a vote was obtained in such sub-district in favor of an independent organization, it was *held* that the fact that a sub-director had not been elected before the organization of the independent district did not invalidate such organization.
2. ——— : **ACT OF LEGISLATURE.** An act of the Legislature curing an informality in the election at which the question of organizing an independent district was submitted would not have the effect to change or modify the boundaries of such independent district.

*Appeal from Winneshiek Circuit Court.*

WEDNESDAY, APRIL 17.

THE plaintiff claims of the defendant the sum of \$961.23. The cause was submitted to the court upon the pleadings, and the following agreed statement of facts :

1. That prior to January 25, 1867, the plaintiff and defendant constituted and composed sub-district No. 5 of Burr Oak Township in said county.
2. That on said 25th day of January, 1867, the inhabitants of said sub-district attempted to organize the same into the Independent District of Burr Oak, but owing to an informality in the election its organization was declared illegal and void by the supreme court.
3. That afterwards, and at a special meeting of the board of directors of the district township of Burr Oak, in said county, held December 13, 1873, such board appointed J. H. Potter as sub-director of sub-district No. 5 of such township.
4. That such sub-director duly qualified and acted in that capacity, by employing teachers for such sub-district No. 5, and doing such other acts as the law required of him.

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Ind. School Dist. No. 8 v. Ind. School Dist. of Burr Oak.

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5. That at such meeting, viz, on December 13, 1873, there was a petition presented to such board duly signed by forty-three qualified electors of said district township, asking that a vote be taken therein upon the question of separate and independent organization of the sub-districts of said district township, which was by said board duly granted, and a meeting duly called for the purpose of voting for or against such organization on the 14th day of February, 1874, whereof due notice was given by the secretary of said district township board.

6. That at an adjourned meeting of said board, held on January 17, 1874, said board passed a resolution creating a new sub-district, No. 8, in the southern portion of said sub-district No. 5, and embracing the following territory, viz: Sections No. 27, 34, 35, and 26 of said district township, except eighty rods in width across the north half of said section 26.

7. That at the said meeting called therefor on the 14th day of February, 1874, at 9 o'clock A. M. of said day, at the usual place, a vote was duly taken by the legal voters of said district township, for or against separate and independent organizations thereof, resulting in there being fifty-three votes cast, all in the affirmative of said question.

8. That on such meeting, viz: February 14, 1874, said board gave due notice that on the 9th day of March, 1874, it being the second Monday of March, a meeting would be held in each sub-district of said district township by the qualified electors thereof, for the purpose of organizing into independent districts, and electing officers as provided by law, and gave to such new sub-district the name of "Sub-District No. 8 of Burr Oak Township."

9. That all sub-districts in such district township, including sub-districts No. 5 and 8 (parties above), met in pursuance of such call and notice, and duly organized by the election and qualification of the proper officers of such sepa-

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Ind. School Dist. No. 8 v. Ind. School Dist. of Burr Oak.

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rate and independent organizations, on the 9th day of March, 1874.

10. That after such organization by such sub-district as an independent district, and on the 9th day of March, A. D. 1874, the officers thereof elected and qualified, as aforesaid, levied by proper resolution therefor the sum of \$200 for the purpose of a school-house fund, and \$40 as contingent fund. and \$200 as teachers' fund, and by proper resolution determined to call their thus organized district by the name of, "The Independent School District No. 8 of Burr Oak."

11. That on the 18th day of March, A. D. 1874, the Legislature of the State of Iowa passed a special act, as set up in the sixth paragraph of defendant's answer, which act took effect April 9, 1874.

12. That said Independent School District No. 8 has built a good brick school-house during the summer or fall of 1874, and has regularly performed the functions of an independent school district since its organization.

13. That about the 31st day of March, 1875, Peter Pfeiffer, then secretary of said independent school district of Burr Oak, defendant herein, presented to the plaintiffs' treasurer the tuition bill hereto annexed, marked Exhibit "A," and received payment therefor, viz :

**EXHIBIT "A."**

BURR OAK, Iowa, March 30, 1875.

SCHOOL DISTRICT No. 8, Dr.

TO BURR OAK INDEPENDENT SCHOOL DISTRICT.

To 16 weeks' tuition of Miss Amanda Berry, at the average rate of 35½ per week, \$5.68.

Please pay.

PETER PFEIFFER, Secretary.

14. That about the same time, the said Peter Pfeiffer,

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Ind. School Dist. No. 8 v. Ind. School Dist. of Burr Oak.

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secretary aforesaid, presented to plaintiff the other tuition bill hereto annexed, marked "Exhibit B," and demanded payment of the same, which was refused, viz :

## EXHIBIT "B."

MARCH 16, 1875.

MR. IRA JOHNSON, Dr.

TO BURR OAK INDEPENDENT SCHOOL DISTRICT.

To 9 weeks' tuition of Neumel Johnson at \$2.00 per	
month - - - - -	\$4.50
To 3 days' tuition of Ed. Johnson at \$2.00 per	
month - - - - -	.30
To 5 weeks' tuition of Josephine Johnson at \$2.00	
per month - - - - -	\$2.50
During fall and winter terms of 1874 and 1875	—
	\$7.30

Please pay.

P. PFEIFFER, Secretary.

15. That May 22, 1875, said district township board of directors met and completed the division of assets and liabilities between the plaintiff and defendant, according to equity and good conscience, giving to the plaintiff the sum of \$961.23 and ordering that the defendant pay the same to plaintiff—which has never yet been done—which division of assets is fair and equitable, if said board of directors had authority to make a division of them. That immediately thereafter, said board disorganized.

The act of the Legislature referred to in this statement of facts, is as follows: "Whereas, on the 25th day of January, 1867, an election was held in sub-district No. 5, district township of Burr Oak, Winneshiek county, for the purpose of organizing such sub-district and certain contiguous territory into an independent district; and whereas an informality existed in conducting such election by opening the polls.

## Ind. School Dist. No. 8 v. Ind. School Dist. of Burr Oak.

at one o'clock, P. M., instead of nine o'clock, A. M., as required by law; therefore,

Be it enacted, etc, That the organization of such independent district of Burr Oak, so far as it relates to the territory of said independent district within the township of Burr Oak, but not that portion claimed by the district from Harper Township, is hereby declared legal, and all the acts of the officers thereof, and all bonds issued and all taxes levied except as above by authority of such independent district, or the officers thereof, so far as they would be affected by the informality in the election aforesaid, shall be of the same force and effect as if it had been in all respects in compliance with law."

The court dismissed plaintiff's petition and rendered a judgment against plaintiff for costs. The plaintiff appeals.

*John T. Clark & Co.*, for appellant.

*E. E. Cooley*, for appellee.

DAY, J.—I. The position of the defendant is that at the time of the election of February 14, 1874, on the question whether all the sub-districts in said district township of Burr Oak should organize as separate independent districts, the plaintiff was not a sub-district, but the territory now claimed by plaintiff was, and for a long time had been, and now is, within the jurisdiction of defendant.

1. SCHOOL DISTRICT: ORGANIZATION OF INDEPENDENT DISTRICT.

Section 1796 of the Code provides: "The board of directors shall, at their regular meeting in September, or at any special meeting called thereafter for that purpose, divide their townships into sub-districts, such as justice, equity and the interests of the people require; and may make such alterations of the boundaries of sub-districts heretofore formed as may be deemed necessary; \* \* \* \* \* provided, that the boundaries of sub-districts shall conform to the lines of congressional divisions of land; and that the formation

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Ind. School Dist. No. 8 v. Ind. School Dist. of Burr Oak.

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and alteration of sub-districts, as contemplated in this section, shall not take effect until the next sub-district election thereafter, at which election a sub-director shall be elected for the new sub-district." Section 1718 of the Code provides that the annual sub-district election, for the election of sub-director, shall be held on or before the first Monday in March, of which five days notice shall be given. Sections 1815 to 1820 of the Code provide for the organization of the sub-districts of any district township into separate and independent districts. On the 13th day of December, 1873, a petition was duly presented to the board of directors of the district township of Burr Oak, as provided in these sections, asking that a vote be taken upon the question of separate and independent organization of the sub-districts of said township, and the board ordered that an election be held for that purpose on the 14th day of February, 1874. Subsequently to the making of this order, and before said election was held, to-wit: January 17, 1874, at an adjourned meeting, the board passed a resolution creating a new district, No. 8, embracing the territory claimed by plaintiff, in the southern portion of Sub-District No. 5, which embraced the territory of both plaintiff and defendant. The election was duly held on the 14th day of February, 1874, and resulted in an unanimous vote in favor of independent organization.

The position of appellee is, that because, at the time of this election, sub-district No. 8 had not elected a sub-director, it was not a sub-district, and hence the election did not create it into an independent district. But this construction of the effect of the action of the board, and the election, would, we think, be too narrow and technical. It was, we think, a sub-district, although its organization as such, for the purpose of employment of teachers, etc., could not take effect until the election of a sub-director. The election held in February gave it an independent organization, and obviated the necessity of holding an election for sub-director on the first Monday in March. On the second Monday in March, pursuant

## Fuller &amp; Co. v. Hunt.

to notice duly given by the board of directors of the district township, this sub-district duly organized by the election and qualification of the proper officers, and thus completed its organization as an independent district.

II. It is claimed, however, that the act of the Legislature of the 18th day of March, which took effect April 9th, 1874, 2. —: —: legalizing the independent district of Burr Oak, act of legisla-  
ture. operated to constitute the territory claimed by plaintiff a part of said independent district. We think this act cannot be allowed to have the effect of re-attaching to said district territory which before had been properly segregated and organized into an independent and separate corporation.

III. It is conceded that the division of assets made by the board of directors of the district township is equitable. The character of plaintiff as an independent district being established, the power to make this division is conferred by section 1820 of the Code.

Under the facts submitted, plaintiff should have had judgment for the amount claimed.

REVERSED.

## FULLER &amp; Co. v. HUNT ET AL.

1. **Homestead Act: MORTGAGE.** A person who has entered land under the homestead act can execute a valid mortgage upon the same prior to the time when he is entitled to make final proof. It is not the purpose of the act to protect the land so entered from a lien created thereon by the person entering it.
2. —: —: The execution of a mortgage is not of itself an alienation.
3. **Mortgage: QUIT CLAIM.** Where one takes a quit claim deed from the mortgagor, paying a consideration less than the value of the land diminished by the amount of the mortgage, with full knowledge of it and in the belief that it is valid, equity requires that as against him the land be charged with the payment of the mortgage debt, without regard to any infirmity that may inhere in the mortgage, unless it be void as against public policy.

48	163
94	582
48	163
113	479
1118	631
48	163
114	655



*Appeal from Clay District Court.*

WEDNESDAY, APRIL 17.

ACTION to foreclose a mortgage executed by the defendant C. D. Hunt. The defendant M. E. Griffin is now the owner of the premises, having purchased and taken a conveyance of them subsequent to the execution of the mortgage. He disputes the validity of the mortgage upon two grounds. In the first place, at the time it was executed the title to the land was in the United States, and Hunt was occupying the same in accordance with an application and affidavit to enter it as a homestead under an act of Congress, approved May 20, 1862, entitled an act to secure homesteads to actual settlers upon the public domain. The five years occupancy had not expired, and he had not become entitled to make final proof. In the second place, he was a married man, and his wife, the defendant M. E. Hunt, did not join in the granting part of the mortgage, but joined merely for the purpose of releasing dower. And while the premises consisted of eighty acres, it is claimed that they are not worth more than \$500, and so it is claimed that the mortgage has no validity, because the premises constituted the mortgagor's homestead, and the mortgage was virtually not executed on the part of the wife. The district court held both of these defenses to be insufficient, and entered a decree of foreclosure as prayed. The defendant Griffin appeals.

*L. M. Pemberton*, for appellant.

*J. A. O. Yeoman* and *E. B. Soper*, for appellees.

ADAMS, J.—I. The first question presented is, as to whether a person who has entered upon land under the  
1. HOMESTEAD act: mortgage: homestead act can make a valid mortgage upon the same prior to the time when he is entitled to make

final proof. It is claimed by the appellant that he cannot, because it is provided in the homestead act that the land shall not become liable to the satisfaction of any debts contracted prior to the issuance of the patent. The debt sought to be enforced was contracted prior to the issuance of the patent. It is abundantly evident that the land could not have been reached by general execution. If the land is liable at all, it is by virtue of the act by which the debtor undertook to create a special lien upon it, and we have to say that we think that the debtor's act had that effect. Mere exemptions from execution do not prevent the debtor from creating such lien. Exemptions are provided merely for the debtor's protection. Such is the general rule, and such, it appears to us, is the intention of the homestead act. The only reason suggested why the claimant under the homestead act should not be allowed to mortgage his homestead is, that it would be against public interest. But the fact that the act provides against alienation by the claimant, and does not provide against mortgaging unless alienation includes mortgaging (a point which will be hereafter considered) indicates that it was not deemed to be against the public interest that the claimant should mortgage his homestead. In *Nycum v. McAllister*, 33 Iowa, 374, it was substantially so held. It is true that in that case the five years had expired when the mortgage was executed, but a patent had not issued. The decision upholding the mortgage was based upon the idea that the provision of the statute that the land shall not be liable for debts contracted prior to the issuance of the patent did not prevent the debtor from creating by contract a special lien. Mr. Justice Beck, in delivering the opinion, said: "The provision is intended as a shield for the debtor's protection." The debts, then, from which the land is exempted by statute must be considered those which are enforceable against it only by general execution. We regard the case above cited as decisive of the question in this case. The fact that in that case the five years had expired does not render it inapplica-

ble as an authority. The land was held liable for a debt contracted before the issuance of a patent. This necessitated a construction of the statute, which excluded from its provision debts charged upon the land by the debtor's own contract. The question of the expiration or non-expiration of the five years affects merely the character of the mortgagor's interest. But it is not claimed by defendant's counsel that the invalidity of the mortgage results from a want of a mortgagable interest, but simply from a disability imposed by statute upon the mortgagor.

II. Another objection is urged by the defendant's counsel, upon the ground that the claimant in making final proof must show by affidavit that he has not alienated the land. The execution of the mortgage, it is said, is an alienation within the meaning of the statute. But we think this is not so. The giving of a mortgage may result in alienation, but it is not such of itself, nor can it be said that the mortgage is given with such purpose. Land is often mortgaged with the view of obviating the necessity of alienation. The office of a mortgage is simply to create a lien. Under our statute the legal title remains in the mortgagor, though the case would probably not be different if it passed to the mortgagee. A conveyance made merely to create a lien lacks the essential element of alienation. This has been repeatedly held in the law of insurance. *Rollins v. Columbian Ins. Co.*, 5 Foster, 200; *Conover v. Mutual Ins. Co.*, 1 Com., 290; *Jackson v. Mass. Mut. Fire Ins. Co.*, 23 Pick., 418; *Hubbard & Spencer v. Hartford Fire Ins. Co.*, 33 Iowa, 333. So, also, it has been held that an inhibition upon selling is not an inhibition upon mortgaging. *Middleton Savings Bank v. Dubuque*, 15 Iowa, 394; *Krider v. Trustees of Western College*, 31 Iowa, 547. In *Nyeum v. McAllister*, as we have seen, a mortgage executed by a claimant under the homestead act, before the issuance of a patent, was sustained. Yet by the act no patent could issue except upon proof by affidavit of the claimant that he had not alienated the land. And the fact that such affidavit

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Fuller & Co. v. Hunt.

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is required renders void an attempted alienation. *Oaks v. Heaton*, 44 Iowa, 116. We cannot, then, regard a mortgage as an alienation.

III. The mortgage is further assailed upon the ground that it is not sufficient in form to bind the land. In respect to forty acres of the land it might be conceded that this position is well taken. The mortgagor's wife did not join in the granting part of the mortgage, and appears to have signed merely for the purpose of releasing dower. It was held in *Sharp v. Bailey*, 14 Iowa, 387, that such an instrument does not bind the homestead.

It is insisted, however, that while the mortgage might be invalid as against the mortgagor or his wife, it is not the right of a purchaser from them to set up its invalidity. Whether he could or not would depend upon whether he purchased the land subject to the mortgage. Where land is purchased of a mortgagor subject to a mortgage supposed to be valid, whether it is so or not, the mortgaged land becomes the primary fund for the discharge of the mortgage debt. The theory is, that the amount of the mortgage is deducted from the purchase money, and it would be inequitable to allow the purchaser to take advantage of the invalidity of the mortgage, and cast the debt upon the vendor who had virtually furnished the consideration for its discharge. Nor is it necessary, in order that the land may stand primarily charged with the payment of the mortgage debt, that the purchaser from the mortgagor should have assumed its payment. It is sufficient if the land was purchased subject to the mortgage, without any personal liability being assumed by the purchaser. *Green v. Turner*, 38 Iowa, 112; *Russell v. Allen*, 10 Paige, 249; *Shuler v. Hanlin*, 25 Ind., 386; Jones on Mortgages, § 736. The question, then, is as to whether Griffin purchased subject to the plaintiff's mortgage. If he had taken a deed with a covenant against incumbrances, it would be presumed that he did not. But he took a quit claim deed, and the consideration named is one dollar. It is true the evidence

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Lister v. Clark.

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shows that the real consideration was an old indebtedness due him from Hunt, but the amount, to say nothing of the value, was not much greater than the value of the land above the plaintiff's mortgage. It appears, also, that at the time he took the conveyance he had full knowledge of the plaintiff's mortgage. It was talked of between him and Hunt, and the evidence tends to show that it was supposed at that time to be a valid mortgage. It appears to us that the understanding between him and Hunt was that he was purchasing and paying for a mere equity of redemption. If so, equity requires that as against him the land should stand charged with the payment of the mortgage debt without regard to any infirmity which may inhere in the mortgage, unless the mortgage was void as against public policy, and we hold that it was not.

In our opinion the decision of the court below should be

**AFFIRMED.**

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**LISTER V. CLARK ET AL.**

1. **Promissory Note: CONTRACT TO EXECUTE.** Where a party enters into a contract to execute a promissory note, and subsequently executes the note in accordance with the terms of the contract, a money judgment cannot be recovered against him in an action on the contract to execute the note.
2. ——— : ——— : **EVIDENCE.** A copy of the contract furnished to the payee by the maker of the note, and at his request, was *held not* admissible as an admission that the note had been changed by parol.
3. ——— : ——— : **MODIFICATION OF.** The written contract not providing for a note with a stipulation for attorney's fees, it was competent for the parties to change its terms by parol so that the maker should be liable for attorney's fees, and the payee should change the date from which interest would commence to run.

*Appeal from Jasper Circuit Court.*

WEDNESDAY, APRIL 17.

**ACTION upon a promissory note. The defendants answered,**

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Lister v. Clark.

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admitting their signatures to the note, and averring that after the delivery thereof the plaintiff, without the knowledge or consent of defendants, changed the same, by erasing certain words therefrom, so as to make it draw interest from date instead of after maturity.

The plaintiff then amended his petition, by adding an additional cause of action, founded upon a contract in writing, by which the defendants, among other things, undertook "to make and deliver to plaintiff their negotiable promissory note for the sum of \$348, payable, with six per cent interest, six months from date."

It appears from said amendment that the promissory note upon which this suit was originally brought was executed and delivered in performance of said written contract.

There was a demurrer to the amendment to the petition, which was sustained and plaintiff excepted.

The cause was tried by a jury. There was a verdict for the defendant. Plaintiff appeals.

*A. K. Campbell and Galusha Parsons, for appellant.*

*J. C. Cook, for appellee.*

ROTHROCK, CH. J.—I. We will notice the objections taken by counsel for appellant to the rulings of the court in the order in which they are presented in argument.

Objection is made to the overruling of the demurrer to the amended petition. We think the ruling was correct. The amendment sought to recover a money judgment upon a contract to give a note, and it did not appear that the defendants failed to execute the note, but, on the contrary, it does appear that they performed the contract.

II. The question in controversy upon the trial was, whether the note in suit was altered before or after it was delivered to the plaintiff. It appears that the contract, by which defend-

2. —: —: —: evidence. ants agreed to give the note, and the note, were exe-

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 Lister v. Clark.
 

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cut on the same day. The contract, as written, provided that the note should draw interest at six per cent from date. The original contract was left with defendants. Some time afterwards plaintiff called upon defendants for a copy, which was made and delivered to him. The defendants claimed, and testified on the trial, that after the contract was made and before the note was delivered, it was agreed by parol that the note should not draw interest from date, but from maturity.

The plaintiff offered to introduce the copy of the contract made by defendants, as an admission that the note as altered was correct.

The court sustained an objection to this evidence, and this is made a ground of complaint.

There was no error in the ruling of the court. The original contract was produced by the plaintiff, and introduced in evidence without objection. The copy was in the same words and figures. The fact that defendants made a true copy of the original for plaintiff could not be taken as an admission that it had been changed by parol.

III. The defendants testified that there was some dispute about the note, as to containing a clause providing for attorney's fees, in case of collection by suit, and that <sup>modification of</sup> they allowed this clause to remain in the note, without erasure (the note being printed), and did not erase the words providing for interest after due, and that the parties finally agreed to the note in that form. This evidence was objected to as contradicting the terms of the written contract. We do not so understand it. The written contract did not provide for a note with a stipulation for attorney's fees, and it was competent for the parties, by parol, to change its terms, by the defendant agreeing to be liable for an attorney's fee, and the plaintiff releasing the interest from date.

IV. The plaintiff sought to show that the note was given for money then due, drawing interest, and in judgment, as tending to corroborate his claim that the note was actually

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Lister v. Clark.

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delivered drawing interest from date. It appears from the written contract that the judgment assigned by plaintiff to defendant was against the Chicago, Newton & Southwestern Railroad Company.

Whether it was collected or not does not appear. If it was not, there was no error in excluding this evidence. Besides, the plaintiff already had the evidence in proper form before the jury in the written contract.

V. Objection is made to overruling certain interrogations propounded to David Ryan, one of the defendants, who was examined as a witness. An examination of the whole of his evidence satisfied us that no prejudice resulted from this action of the court. Some of the rulings standing alone would seem to be erroneous, but the witness was afterward required to answer as to the material facts inquired about.

VI. Lastly, it is urged that the court erred in instructing the jury that the burden of proof was upon the plaintiff to show that the note was altered by erasure before delivery.

The record shows that the plaintiff, at the opening of the trial, offered to assume the burden of proof, and claimed the right to do so, and also the right to open and close the case. This claim was accorded to him by the court, against the objection of defendants.

As the plaintiff voluntarily assumed the burden of proof, and insisted it was upon him, he cannot now complain because the court followed his claim to its legitimate conclusion, and instructed the jury accordingly.

**AFFIRMED.**



## THE STATE V. EMERSON.

1. **Criminal Law: EVIDENCE.** Upon the trial of one indicted for larceny, evidence showing that he had compromised an action against him to recover the amount of the property alleged to have been stolen, was incompetent.
2. ———: **POSSESSION OF STOLEN PROPERTY: EVIDENCE.** An instruction directing the jury that in order to rebut the presumption of guilt arising from possession of property recently stolen, defendant must, by a preponderance of testimony, reasonably satisfy the jury that his possession was innocent, was held to be erroneous.

*Appeal from Madison District Court.*

WEDNESDAY, April 17.

THE defendant was convicted of grand larceny and sentenced to the penitentiary for one year. He appeals to this court. The facts of the case appear in the opinion.

*Ruby & Wilkin*, for appellant.

*J. F. McJunkin*, Attorney General, for the State

BECK, J.—I. The defendant is charged in the indictment with stealing three head of cattle, the property of one Wetzel. There was evidence tending to prove that he had taken the cattle from the range where they had grazed, and driven two to Winterset, where he sold them to a butcher, by whom they were slaughtered. Another one was found in his possession upon his farm. He claimed to own it, but finally gave it up to Wetzel. The identity of the cattle sold to the butcher, and defendant's ownership of the animals, were the subjects of conflicting testimony.

II. In support of the prosecution evidence was introduced, against defendant's objection, showing that Wetzel had brought an action against defendant for the value of the cattle. This suit was settled and defendant paid Wetzel \$125

1. CRIMINAL  
law: evidence.

## The State v. Emerson.

in satisfaction of his demand. The testimony was clearly incompetent, and unquestionably had a prejudicial effect against defendant. Defendant may have settled the cause for the sake of peace, when really he was guilty of no crime and not justly liable in the action—such occurrences are not uncommon—or he may have been liable to Wetzel for the value of the cattle, and yet be guilty of no crime. He may have innocently acquired the possession of the cattle from another by purchase, or even in good faith supposed them to have been his own property when he drove them from the range. In either case he would have been liable to the owner for the value of the property, yet he would not have been guilty of larceny. In such cases it would have been his duty to pay for the cattle and settle the suit. The testimony, in our opinion, was erroneously admitted by the district court.

III. The court gave the following instructions to the jury:

"7. Where it is shown that soon after the property was stolen the same, or some part thereof, was found in the possession of a defendant accused of the larceny, to avoid the <sup>2</sup> ———: possession of stolen property: evidence. presumption of guilt arising from such possession the burden of proof is upon him, and he must, by a preponderance of evidence, explain his possession, and reasonably satisfy the jury that it was innocent."

The last thought of this instruction is erroneous. It is this: In order to rebut the presumption of guilt from possession of property recently stolen, defendant must, by a preponderance of testimony, "reasonably satisfy the jury" that his possession is innocent; that is, the jury are authorized to convict the accused when the larceny has been proved, upon testimony showing his recent possession, unless they are satisfied, by a preponderance of testimony, such possession is innocent.

Now, the jury may not convict, unless they are satisfied, beyond a reasonable doubt, of defendant's guilt. The testimony may establish the larceny, and defendant's recent possession, beyond a reasonable doubt. But if that possession,

was innocent, defendant is not guilty. We discover that the character of the possession and the *animus* of defendant are essential ingredients in determining his guilt. His innocence may not be presumed after the *corpus delicti* and recent possession are shown, but the burden of proving it is cast upon him. Innocence, under such circumstances, is in the nature of a defense to the case made by the recent possession. But when a reasonable doubt exists as to the character of the recent possession, whether it be innocent or guilty, a reasonable doubt exists as to defendant's guilt. If such doubts exist, he cannot be convicted. Now, such doubt may arise in the minds of the jury upon less than a preponderance of testimony. It was, therefore, erroneous to direct the jury that they could find defendant guilty unless defendant, by a preponderance of testimony, "reasonably satisfied" them his possession of the cattle was innocent.

It will be readily seen that defendant's guilt may have wholly turned upon the *animus* of his possession of the property. No question may have existed as to the *corpus delicti* or the recent possession. In that case, if they could have found defendant guilty because he had not established the innocence of his possession by a preponderance of proof, he would have been deprived of the benefit of the doctrine of reasonable doubt. *State v. Porter*, 34 Iowa, 131.

Other questions raised in the case need not be discussed. It is sufficient to say that we discover no other errors in the record. For those above pointed out, the judgment of the district court must be

REVERSED.

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Bigelow v. Church.

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## BIGELOW v. CHURCH ET AL.

1. **Judgment:** EQUITABLE JURISDICTION. C. commenced an action against B. and others, aiding the same by attachment levied upon certain property as that of B. B.'s father commenced an action to recover possession of the attached property. An agreement for settlement of the actions was made in vacation, whereby B. undertook to pay the costs and the actions were to be dismissed, no time for the payment of costs being fixed. These not being paid at or before the time when the cases were triable, C. obtained judgment: *Held*, that equity would not interfere to set aside the judgment.

*Appeal from Hamilton Circuit Court.*

WEDNESDAY, APRIL 17.

ACTION in equity to restrain the enforcement of, and set aside a judgment at law.

The Circuit Court denied the relief asked, and the plaintiff appeals.

*W. C. Connell*, for appellant.

*Hyatt & Lee*, for appellees.

SEEVERS J.—The pleadings are so framed as to present for determination a single question of fact. Alfred Bigelow (a son of the plaintiff), Moore and Stevens, purchased a machine of the defendant Church, partly or wholly on credit, and being indebted therefor, Church commenced in the Circuit Court an action based thereon. He caused an attachment to issue, under which there was seized a team found in the possession of Alfred Bigelow, but which the plaintiff claimed belonged to him. He caused to be commenced in said court an action to recover the possession of said team. These actions were pending and for trial at the January Term, 1875, of the court. Previous to which, and sometime in January,

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Bigelow v. Church.

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an arrangement was made between Alfred Bigelow, Moore, Stevens, and Church, whereby the latter agreed, in consideration that Bigelow should pay the costs in said actions, he would release him from the payment of any portion of the machine indebtedness. No time was fixed for the payment of said costs, and the same not being paid by the term of court at which the action brought by the plaintiff to recover possession of the team stood for trial, and the plaintiff failing to make his appearance, Church procured a judgment to be rendered in his favor, to set aside which this action is brought.

If Alfred Bigelow or the plaintiff had paid the costs before the term at which the judgment was rendered, the agreement made in relation thereto would have authorized a dismissal of the action commenced by the plaintiff. Even if not dismissed, Church could not legally have taken judgment therein; and had he done so, we incline to think a court of equity would have set it aside. But we are of the opinion it is fair to presume the costs were to be paid before the term of court, although nothing was said on the subject; and as the same was not done, Church might well conclude the agreement made in reference thereto had been repudiated and abandoned. Church could not dismiss the action brought by the plaintiff, nor could he insist it should be dismissed at plaintiff's costs. He did all he could do except to ask a continuance, which might or might not have been granted. The action was pending and liable to be called for trial at any time, and Church, for his own protection, was compelled to be in attendance until the case was in some manner disposed of. If the Bigelows in fact intended to comply in good faith with the agreement, a reasonable and fair degree of diligence would have enabled them to do so.

**AFFIRMED.**

## HOLMES V. HULL ET AL.

1. **Practice in the Supreme Court:** TRANSCRIPT. Advantage can be taken of a failure to file a transcript, in the absence of an agreement to waive it, only by a motion to dismiss or affirm.
2. **Jurisdiction:** PLEADING. Where a case before a justice of the peace against several defendants had been settled by one of them before the time set for trial, and before the filing of an answer, and it had been so entered upon the docket, it was *held* to be too late after that time to file an answer and counter-claim.

*Appeal from Fayette Circuit Court.*

WEDNESDAY, April 17.

On the 1st day of September, 1876, the plaintiff filed in the Circuit Court his petition, alleging that a judgment had been rendered against him, in favor of the defendants, by a justice of the peace, on the 14th day of August, 1876, for the sum of \$100 and \$6.25 costs, which had been erroneously entered, and that the justice had no power or jurisdiction to render the same. A writ of error was prayed and issued. Upon the justice filing his return thereto, a hearing was had, and the judgment of the justice affirmed, and the plaintiff appeals.

*J. W. Rogers & Son*, for appellant.

*Rickel & Clements*, for appellee.

SEEVERS, J.—I. The appellee insists that the amount in controversy is less than one hundred dollars, and as there is no certificate of the trial judge, as required in such cases by section 3173 of the Code, that this court must, as a matter of course, affirm the judgment below.

Counsel claims that the pleadings in the action before the justice must determine the amount in controversy. In this

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he errs. It is the pleadings in this case that must determine the amount in controversy in this proceeding. This being true, there is no difficulty, because the judgment against the plaintiff, and which he claims was rendered by the justice without jurisdiction, is for \$106.25 including costs. It drew interest from the 14th day of August to the 1st day of September, and, therefore, if the costs be excluded, the amount in controversy exceeds one hundred dollars.

II. It was agreed by counsel the cause should be submitted to this court on the abstract before us, and no objections are taken as to its correctness. It was not expressly agreed that no transcript should be filed, and none has been. No motion has been made to dismiss the appeal or affirm the judgment below because of the failure to file a transcript. But it is urged in argument, for the first time, that such failure to file a transcript is fatal to a consideration of this case on the merits, and the judgment must be affirmed. In this we do not concur. The objection comes too late. Under our practice, we would not look at the transcript if one had been filed. The statute contemplates that the dismissal of the appeal, or affirmance of the judgment, shall be on motion. Had that been made, we should, under the circumstances of this case, have given the plaintiff leave to file the transcript.

III. The plaintiff commenced an action by attachment before a justice of the peace against the defendants and the cause was set for trial on the 15th day of August, 1876, the defendants being so notified as provided by law.

On the 9th day of August the plaintiff called at the office of the justice, and stated that L. A. Hall, one of the defendants, had paid his claim, and that he desired to withdraw the cause. He also paid into court the costs up to date, and the court made the following indorsement on the papers in the case: "The case settled out of court, and my fees paid, to-wit, \$1.75."

On the 14th day of August the defendants filed an answer and counter-claim, in which damages for the wrongful suing out of the attachment were claimed. On this counter-claim the judgment complained of was rendered.

We are of the opinion that at the time the counter-claim was filed no action was pending before the justice, and that the filing thereof did not have the effect to bring before the justice anything to try and determine. He had no jurisdiction to render the judgment complained of.

A party may, at any time before any pleadings are filed by the defendant, dismiss his action, and the latter has no cause of complaint because he does so. This right is absolute and without conditions or restrictions. After a counter-claim has been filed, the plaintiff cannot dismiss his action, and thus prevent a trial thereon. Code, §§ 2844, 2846.

IV. After the cause was called by the justice for trial on the counter-claim, "O. W. Rogers appeared before the justice and expressed a desire to see the papers in the case, which were shown him." He then said to the justice that he had no "jurisdiction or authority to go on or try said cause." Rogers repeated such objections several times. The justice thereupon informed Rogers he would proceed with the case, and Rogers then left the justice's office. It is a controverted question whether Mr. Rogers, who is an attorney, had authority to appear for the plaintiff, but we will assume he had. We do not think there was any appearance made by Mr. Rogers. He came into the office, looked at the papers, told the justice he had no jurisdiction, and left. Taking it for granted Mr. Rogers had authority to appear for the plaintiff, he in no manner indicated he did so. For aught that appears, he was acting on his own motion, and purely as a friend of the court. The affidavits submitted to the court below satisfy us that Mr. Rogers did not intend to appear for the plaintiff, and that he did not.

V. No motion was made before the justice asking him to correct the error committed by him, and appellee insists this



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Jordan v. Winsor and Snyder.

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is essential and should have been done before the Circuit Court can be asked to do so. He cites and relies on section 3168 of the Code and *Leonard v. Hallem*, 17 Iowa, 564; *Smith v. Parker*, 28 Id., 359. All that these two cases hold is, that when there is a *defective* service of the original notice such a motion is necessary. The statute does not apply to a case of this kind where the court had no jurisdiction. Where there has been an entire failure to serve any notice whatever, the party may proceed by an original action, aided by injunction, if necessary, to have such a judgment set aside. Having knowledge of this judgment, however, within the time allowed for suing out a writ of error, he was required to proceed as he did.

REVERSED.

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JORDAN V. WINSOR AND SNYDER.

1. **Practice:** TRIAL DE NOVO. Where on appeal it was determined that the appellant was not entitled to a trial *de novo*, but the cause was determined upon the errors assigned, and the decree was reversed, a *procedendo* in the usual form issuing to the court below, the appellant was not entitled upon the remand to a judgment, but the cause stood for trial anew like a law action, notwithstanding it may have involved an equitable issue.

*Appeal from Keokuk District Court.*

WEDNESDAY, APRIL 17.

In July, 1875, plaintiff commenced an action against the defendant Winsor, for the foreclosure of two mortgages upon certain real estate.

In August, 1875, G. F. Snyder intervened in the action, claiming that before the mortgages were executed, he sold and conveyed the mortgaged premises to Winsor, and that \$1,200 of the purchase money was yet due and owing, and that at the time plaintiff's intestate purchased said mortgages he had actual notice of the intervenor's said claim, and that

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Jordan v. Winser and Snyder.

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the same was for said purchase money. He prayed that his claim be decreed superior to plaintiff's mortgages.

Upon these pleadings there was a trial, and it appeared from the evidence that Winser purchased the land of Snyder in 1870, and that \$1,150 of the purchase money was still unpaid; that no note, or other writing, was given therefor; that a conveyance of the land was executed and delivered at the time of the purchase, and that the original mortgagee had full knowledge, when he took his mortgage, that this purchase money had not been paid. It was further shown that at the time plaintiff's intestate purchased said note and mortgage from Storm, the mortgagee, and took an additional mortgage, he knew of said claim of Snyder, and that it was for the purchase money, and unpaid.

It was found by the court that plaintiff's lien was superior to the *lien of the intervenor*, notwithstanding the notice of the claim of Snyder. From the decree Snyder appealed to this court.

It was held in this court that appellant was not entitled to a trial *de novo*, but the cause was determined upon the errors assigned the same as a law action. The decree was reversed, and a *procedendo* in the usual form was issued.

After the cause was remanded Snyder filed his motion for judgment and decree "in accordance with the judgment and opinion of the Supreme Court." The motion was sustained, to which the plaintiff at the time excepted. A decree was entered reversing the priority of the liens as found in the first decree.

Plaintiff appeals.

Woodin & McJunkin, for appellant.

C. M. Brown and D. P. Stubbs, for appellee.

ROTHROCK, CH. J.—I. The basis of the first decree in the court below was that section 1940 of the Code, which requires

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The Ind. School Dist. of Asbury v. The Dist. Court for Dubuque Co.

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vendors' liens to be evidenced by conveyance, mortgage, or  
 1. PRACTICE: other instrument, duly acknowledged and recorded,  
 trial anew. applied to liens which accrued prior to the Code. In this view  
 it was entirely immaterial whether or not Jordan knew of Snyder's claim at the time he took his lien. Upon appeal this court held that sec. 1940 had no application to this action, because the vendor's lien existed before the Code took effect. The question of the notice of the lien then became material.

When the cause was reversed and remanded, it stood for trial anew upon the evidence, the same as a law action. There was no finding of facts, or special verdict, upon which this court could render judgment, or order the court below to render judgment without a trial. Upon being remanded, it was the right of plaintiff to have a new trial.

II. It is urged that no request was made by plaintiff for a new trial, or to introduce evidence. As the cause stood for trial anew no request for a trial was necessary. It was the plaintiff's right to have the trial when the cause was reached for that purpose, without motion or request. This was denied him by sustaining the motion over his objection, and entering a decree against his protest.

REVERSED.

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THE INDEPENDENT SCHOOL DISTRICT OF ASBURY v. THE DISTRICT COURT FOR DUBUQUE COUNTY.

1. **School District: APPORTIONMENT OF JUDGMENT: CERTIORARI.** Where an action was instituted upon a school order of a district township which had been subsequently reorganized into independent districts, the District Court had jurisdiction to render judgment thereon against the several independent districts, and to issue a *mandamus* commanding the directors to assemble and apportion the amount of the judgment among the several judgment debtors. *Certiorari* would not lie to the District Court upon the ground that it had exceeded its jurisdiction.

WEDNESDAY, APRIL 17.

THIS is a petition for a writ of *certiorari* to the Dubuque District Court, in which it is alleged the said court has exceeded its jurisdiction, and ordered that to be done for which there is no authority in law.

The facts averred in the petition are in substance as follows: Henry Kennedy was the holder of a certain school order issued by the district township of Julien, November 8, 1873. After the issuance of the order the district township of Julien, under the provisions of the statute, was reorganized into the following independent districts, to-wit: Derby-Grange, Stone Hill, Oakville, Wilton, Julien, Jefferson and Asbury. The indebtedness evidenced by said order was not apportioned among said independent districts by the old board of directors of the district township of Julien, as prescribed by law. An action was brought upon said order by said Henry Kennedy in said District Court against all of the said independent districts, and a joint judgment was rendered against them for the amount due on said order, and for costs; and it was ordered and decreed that if an execution should be returned unsatisfied, then the writ of mandamus should issue commanding each of the said independent districts, through their proper officers and directors, to assemble together and apportion among themselves the amount that each should pay in satisfaction of said judgment; and that after said apportionment the said officers should certify the same to the board of supervisors in order that said board might levy the same against said districts according to said apportionment, and that said money when collected and paid over by the county treasurer should be applied in satisfaction of said judgment.

The writ of mandamus was issued, and in obedience thereto the individuals therein named as directors met and voted for an apportionment of said judgment. The secretaries

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The Ind. School Dist. of Asbury v. The Dist. Court for Dubuque Co.

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of the boards of directors of said districts, excepting that of Asbury, signed the certificate to the board of supervisors, requesting that said tax be levied in pursuance of the apportionment upon the said independent districts respectively.

The secretary of the said district of Asbury having failed to sign the certificate as directed by the writ of mandamus, the District Court ordered that N. W. Boyes be appointed to sign the name of said secretary, which was accordingly done.

The board of supervisors, in accordance with said certificate, levied a tax upon the said independent districts in amount sufficient to pay said judgment, interest and costs. The apportionment made by the boards of directors required the district of Asbury to pay \$779.64, and the other districts to pay \$20 each, excepting the district of Jefferson, as to which the action was before that time dismissed.

It is prayed that the judgment and decree in said action, and the said writ of mandamus, and the levy of said tax, be annulled and vacated.

*M. H. Beach*, for the plaintiff.

*Fouke & Lyon*, for defendant.

ROTHROCK, CH. J.—The Code, § 3216, provides that “the writ of *certiorari* may be granted whenever specially authorized by law, and especially in all cases where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, when in the judgment of the superior court there is no other plain, speedy, and adequate remedy.”

It was held in the case of the *Knoxville National Bank v. The Independent District of Washington*, 40 Iowa, 612, where a school order was issued by a district township for the services of a teacher in one of the sub-districts, and before its payment the several sub-districts of the township were organized into independent districts, that an action upon the order could

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The Ind. School Dist. of Asbury v. The Dist. Court for Dubuque Co.

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not be maintained against the independent district, composed of the same territory as went to make up the sub-district where the school was taught. It was also held in that case that each of the independent districts, embracing the territory of the original district township, was liable for the debts of the district township in proportion to the value of the property of the district to which it succeeded, and that all might be united in action as defendants.

Following that case, the District Court, in the case at bar, had jurisdiction of all of the independent districts of the township. It unquestionably had jurisdiction of the subject-matter of the action. It, therefore, did not exceed its jurisdiction in entertaining the action and rendering the judgment.

If, having jurisdiction of the action, the court erroneously ordered an apportionment of the judgment to be made among the several parties defendant, or if the apportionment actually made was unjust or oppressive upon one of the districts, by taking the proper steps therefor, such erroneous action could have been corrected in the court below, or failing in that, an appeal could have been taken to this court.

The writ of *certiorari* will not lie where there is a plain, speedy and adequate remedy by appeal. *Davis Co. v. Horn*, 4 Greene, 94; *Fagg v. Parker*, 11 Iowa, 18.

The application for the writ will be

DENIED.

## VAN DORAN V. MARDEN.

1. **Husband and Wife: EXECUTION.** The husband is the head of the family within the meaning of the statute exempting from execution certain property with which he habitually earns his living. Such property belonging to the wife before her marriage, and used for the family support, is not exempt from execution levied under a judgment against her.

*Appeal from Greene Circuit Court.*

WEDNESDAY, APRIL 17.

**ACTION at law.** The case was submitted to the court without a jury, and judgment rendered for defendant.

Plaintiff appeals.

*McDuffie & Howard*, for appellant.

*Harvey Potter*, for appellee.

BECK, J.—I. This was an agreed case and was submitted to the court below in order to obtain an adjudication to determine whether a team of horses seized by defendant, as constable, to satisfy an execution issued upon a judgment against plaintiff, is exempt from levy under the statute. The facts, briefly stated, are as follows:

The plaintiff was the widow of one Morelan, who owned the horses in controversy. They were set apart to the plaintiff and were exempt from execution in the hands of her husband. She was the mother of three children by Morelan. Subsequently she married her present husband, and her children have lived with her and her husband, supported by their joint personal labor. The horses are used by her husband for the support of the family, composed of himself, wife and her children. After her marriage to her present husband, a judgment was recovered against plaintiff,

## Van Doran v. Marden.

and the horses were seized upon an execution issued thereon. She claims that they are exempt from seizure, and this action is brought to recover their possession.

Plaintiff bases her right to hold the horses exempt from execution upon Code, § 3072, which provides that a debtor, who is the "head of a family," may hold, free from levy, the

1. HUSBAND  
and wife: exe-  
cution.

team with which "he habitually earns his living."

She insists that she is the head of the family, and, therefore, within this provision. The sole question which we are called upon to determine is this: Is the plaintiff "the head of a family" within the meaning of this statute?

It is not claimed that the wife is generally to be regarded as the head of a family, but that in this case, where she is the owner of property, which, if held by the husband, would be exempt from execution, she is within the provisions of the statute, and is to be regarded as the "head of the family." Whether the plaintiff is to be so regarded is a question of law, and not of fact. The term "head of the family" is used in reference to the relation existing between the members of the family as recognized by law and the usage of society. There may be a head of the family when there is no marriage relation existing. *Whalen v. Cadman*, 11 Iowa, 226. When, however, marriage relation does exist, the headship of the family cannot depend upon circumstances of property held by the parties. If this were so, the question involving the headship of the family would be one of fact, and never of law. That it is a question of law, when the husband is resting under no disability, we think cannot be doubted. One reason, and only one for this conclusion, need be given. It is this: The universal sentiment of the people is and has been for ages that the husband is the head of the family. The term was used by the Legislature in the statute in question in its universally accepted signification. The reason which we have given for holding this to be a question of law solves the very question of the case, and leads to the conclusion that the husband is the head of the family. Support to this conclu-



sion is found in the following decisions: *Whalen v. Cadman*, 11 Iowa, 227; *Lawrence v. Sinnamon*, 24 Iowa, 80.

II. We know of no legislation which changes the relations of husband and wife, so as to give the headship of the family, in any case, to the wife. He is still bound for her support and entitled to her earnings when she is not engaged in business on her own account. *Mewhirter v. Hatten*, 42 Iowa, 288; *Tuttle v. C. R. I. & P. R. Co.*, 42 Iowa, 518; *Grant v. Green*, 41 Iowa, 88.

Code, § 2202, clothes a woman with the same right and authority touching her own property as is possessed by the husband over property owned by him. But this provision bestows rights; it does not create exemptions, which only exist under explicit provisions. We discover nothing in this section in conflict with the conclusion we have above announced.

A consideration, which we may mention here, gives strength to our view of the case. If, when the wife holds property, she is the head of the family, the husband must be deposed of his headship, or the family will have two heads. The first position cannot be admitted. The second is contrary to reason, for in that case the property of each "head" would be exempt, and thus there would be a double exemption, which is surely not contemplated by the statute.

III. It is argued that as the wife, before her marriage, held the property exempt from levy, a change in her condition could not change her rights. This conclusion is a *non sequitur*. The change of condition may change her rights, if the exemption may be so called. She had the right to hold the property free from levy because she was the head of a family; she voluntarily surrendered that headship and with it her rights. It would not be claimed that a husband, whose family consisted of himself and wife, would continue to hold property exempt from execution after he procured a divorce and was restored to all the rights of a single person. This case is not different from the one before us.

## Kennedy v. The Ind. School Dist. of Derby Grange.

We conclude that the judgment of the Circuit Court, holding the property subject to execution issued on a judgment against the wife, is correct.

AFFIRMED.

KENNEDY V. THE INDEPENDENT SCHOOL DISTRICT OF DERBY  
GRANGE ET AL.

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102	646
48	189
139	26

1. **School District: OFFICER.** The treasurer of a school district is an officer thereof, and service of an original notice upon him in an action against the district constitutes service upon the district.

2. ———: **JUDGMENT AGAINST INDEPENDENT DISTRICTS: JURISDICTION.** Where the district organization had been abandoned, and the several sub-districts organized into independent districts, it was *held*, that an action in equity might be maintained against them upon a debt of the district, and that the District Court had jurisdiction to render judgment thereon, and to issue a writ of *mandamus* commanding the directors of the independent districts to apportion the amount of the judgment among them. *Held*, further, that the apportionment thus made did not conclude any district, but that it might maintain an action against the others for contribution.

*Appeal from Dubuque District Court.*

WEDNESDAY, APRIL 17.

THE plaintiff furnished labor and material for the erection of a school-house in the district township of Julien, and the district township became indebted to him therefor in the sum of \$350.64, which is still unpaid. After the indebtedness was contracted, the district township organization was abandoned, and the several sub-districts were organized as independent districts. No division of the assets and liabilities was made. This action was brought against the several independent districts to recover the amount of the claim. Judgment was

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Kennedy v. The Ind. School Dist. of Derby Grange.

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rendered therefor. A writ of mandamus, also, was issued, commanding the directors of the independent districts to assemble and apportion among the districts the amount which each should pay of the plaintiff's judgment, and cause the same to be certified by the secretaries of the respective districts to the board of supervisors. A return was made to the writ, showing an attempted compliance by all the defendants except one, to-wit: the independent school district of Asbury. The return shows that the directors of the different districts met, including those of the district of Asbury. At the meeting a resolution was passed, apportioning among the different districts the amount which each should pay of the plaintiff's judgment, and one other judgment, amounting in all to \$879.64. The apportionment made was as follows: To the districts of Derby Grange, Oakville, Stone Hill, Wilton and Julien, each \$20, to the district of Asbury, \$779.64. All the directors voted for the resolution except the directors for the district of Asbury, who voted against it. They made a return to the writ, stating, in substance, that they had no power under the law to comply with it, and that the district of Asbury had never been served with any notice in the action, nor had it employed any attorney to appear for it.

The secretary of the district of Asbury refused to join in certifying the apportionment to the board of supervisors, and the court appointed one Boyes to sign the secretary's name to the certificate. Afterwards the district of Asbury moved to set aside the judgment, stating, in substance, as the grounds therefor, that the district was not served with notice; that no authorized appearance was made for it; that no default was entered; that no entry of an order for the issuance of the writ was made, and no record of a judgment or decree has been approved or signed, and that the directors have no legal power to comply with the writ. The court overruled the motion, to which the district of Asbury excepted.

The district appeals.

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Kennedy v. The Ind. School Dist. of Derby Grange.

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*M. H. Beach*, for appellant.

*Fouke & Lyon*, for appellee.

ROTHROCK, CH. J.—I. Whatever service of original notice was made upon the district of Asbury was made by service upon the treasurer of the district. It is claimed by the district that that was not sufficient. Service of a notice upon a school district may be made by service upon any officer thereof. Code, § 2612. We have only the question then as to whether the treasurer of a school district is an officer. It is insisted by the district that he is a mere employe. The argument for this view is that he is elected, not by the electors of the district, but by the board of directors; that he is not necessarily a member of the board, and is in fact not a member in this case, and is charged with no duty except the custody of the funds and the payment of orders. We are of the opinion, however, that this does not constitute him a mere employe. An office in a municipal corporation is a public function established by law. The mode of filling it is provided by law. Whoever is duly invested with the office has a right to it, until his right expires in some way provided by law. We think that a treasurer of a school district is an officer, and that service of the original notice upon him was service upon the district.

II. The district, then, was bound by the action of the court, so far as it had jurisdiction. That it had jurisdiction to render judgment on the claim against the defendants served with notice is, of course, not denied. We have only to determine whether it had jurisdiction to order the issuance of the writ of mandamus.

The petition was entitled in equity. It demanded judgment for the amount due, and prayed that in the event an execution should be returned unsatisfied, a writ of mandamus should be issued commanding the defendants by their proper

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officers to meet and apportion among themselves said indebtedness as shall be equitable and just, and after this shall be done, to then cause such apportionment to be levied at the next regular assessment for school purposes. After the judgment was rendered, an execution was issued and returned unsatisfied, and then the order for the writ of mandamus was entered, and the writ issued. It is a rule of general application that when a court has obtained jurisdiction of the person of the defendant, and jurisdiction of the subject-matter of the action, no error committed in the exercise of that jurisdiction can make the proceedings or judgment of the court void. Freeman on Judgments, § 135, and authorities in note.

The subject-matter of this action was, first, a claim upon a money demand, and next, a demand for an order for a writ of mandamus to compel the districts to apportion the amount, and cause the levy of a tax to be made for the payment of the judgment.

The District Court is a court of general original jurisdiction. It has jurisdiction of the ordinary action for judgment on the debt; and it has jurisdiction in all actions for the writ of mandamus. Having jurisdiction of the subject-matter, it is not a question for our determination upon this appeal, whether the court erred in exercising its jurisdiction. We have no doubt that it was within the jurisdiction of the court to compel the payment of the judgment in some way. As all school property is exempt from execution, the only means of payment was by the levy of a tax upon the taxable property of the districts. Such tax has been levied, and is now upon the tax books for collection. While it may be conceded that the means used to procure the levy were irregular, yet, the court having had jurisdiction, the levy is not void.

When a district township organization is abandoned, and independent districts are organized, and there is indebtedness against the district township remaining unpaid, the creditors may take judgment against all the independent districts as was done in this case. *Knoxville Nat. Bank v. The Ind. Dist.*

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Kennedy v. The Ind. School Dist. of Derby Grange.

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of *Washington*, 40 Iowa, 612. While a creditor of the district township should not be allowed to maintain an action against one, alone, of the independent districts, no one representing in any proper sense the original debtor, yet after the creditor has obtained judgment against them all, and the liability of all has been thus determined, we see no reason why the creditor should not be allowed to collect his judgment from one or all as best he can, leaving the judgment defendants, as the opinion in the case cited suggests, to determine in an appropriate action their respective obligations among themselves. That a court of equity would have jurisdiction of such an action, we have no doubt.

That the apportionment made in this case is an adjudication of the rights of the independent districts, as among themselves, we do not hold. The mandamus or order for the levy of a tax in this case supplies the place of an execution upon a judgment against a natural person. A plaintiff in execution may cause a levy to be made upon the property of one of several joint judgment debtors, and thus collect the whole of the judgment. But this would be no adjudication as between the joint judgment debtors. They could maintain actions against each other for contribution. So in the case at bar the order to apportion the tax did not conclude any district which did not agree to the apportionment. The plaintiff was interested only in the collection of his debt. It did not concern him whether the district of Asbury should pay all of it, or whether each district should pay a part.

We do not find anything in the record which adjudicates the apportionment as between the defendants, and we do not think they are concluded from maintaining an action to determine their respective obligations.

But believing, as we do, that the court below had jurisdiction of the subject-matter of the action, as between the plaintiff and the defendants, the levy of the tax must be held binding upon all the defendants.

**AFFIRMED.**

## MAYFIELD V. BENNETT.

1. **Judgment: MUST BE CONSTRUED IN LIGHT OF RECORD.** Where a judgment recited generally that notice had been served upon the defendant, and the record showed the service to have been by publication, *held*, that the recital would be taken to mean a service in that manner, and the judgment would be construed as *in rem* only, and not authorizing the issuance of a general execution.
2. ———: **EFFECT OF APPEARANCE AFTER JUDGMENT.** The appearance of the defendant after judgment, for the purpose of moving for a new trial, would not have the effect to render the judgment a personal one.

*Appeal from Mitchell District Court.*

WEDNESDAY, APRIL 17.

In 1858 plaintiff commenced an action in the Mitchell District Court against defendant, upon an account for goods sold. It was averred in the petition that defendant was a non-resident of the State, and a writ of attachment was issued upon that ground. Among the files in said case is found an attachment bond; a writ of attachment duly tested by the clerk of the court, with a return of the sheriff showing a levy upon certain real estate in Worth county; an original notice, with a return of defendant "not found;" an affidavit for an order of publication setting forth that defendant was a non-resident of the State, and that the sheriff to whom the original notice was delivered had returned the same "not found;" and an order for publication. There is nothing upon any of these papers showing that they were ever filed in said action or court.

On the 22d day of June, 1858, an affidavit of the plaintiff was filed showing that the residence of the defendant was unknown to the plaintiff and his attorney and business agent, and could not, with reasonable diligence, be ascertained. On the same day proper proof of publication was filed, with the original notice attached.

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92	639
48	194
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No other pleadings, notice or proof of service of notice, can be found among the papers in said action, and there is nothing in the record showing that any other was filed.

On the said 22d day of June 1858, upon the papers herein before set forth, the said District Court, being then in regular session, rendered a judgment in said action, which is in these words: "And now, to-wit, on this 22d day of June, 1858, it being the second day of the June term of this court, this cause came up for hearing. The plaintiff, by his attorneys, appeared. The defendant did not appear, but made default, and on being called, came not. The plaintiff offered in evidence his books of account, and proved to the satisfaction of the court that service of notice had been made upon said defendant, and all things having been done in the premises, the said court, after hearing the proofs and allegations of the said plaintiff, ordered and adjudged that the said plaintiff have and recover of the said defendant the sum of nine hundred and twenty-nine dollars and sixty-three cents and the costs of suit. And accordingly the said court rendered a judgment against said defendant and in favor of said plaintiff for the said sum of nine hundred and twenty-nine dollars and sixty-three cents and the costs of suit, taxed at twenty-three dollars, and that the attachment in this case be sustained, and that the property attached be sold to satisfy the aforesaid judgment, and that a special execution be issued against said property, to-wit: All the right, title and interest in and to the village of Bristol, situated in section 8, township 99 north, of R. 22 west, in Worth county, Iowa, belonging to John M. Bennett."

On the 24th day of May, 1859, the defendant filed a petition to set aside said judgment upon the ground that he had not been personally served with the original notice of the action, and had no reliable information of said judgment until March, 1859. This petition set forth a meritorious defense and was supported by an affidavit averring, among other things, that defendant had no knowledge of the commencement of the action until November, 1858.



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Mayfield v. Bennett.

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Proper notice of this petition was served upon the plaintiff on the 31st day of May, 1859.

July 2, 1860, the defendant filed a motion for a change of venue. No action was taken upon said petition to set aside said judgment, and in 1860 the same was dismissed and the cause stricken from the docket, but at whose instance does not appear.

In February, 1859, a special execution was issued for the sale of the attached property, and the same was returned at the request of Eaton & Pooler, attorneys at law. It does not appear, however, that said attorneys were in any way connected with, or employed in, the case.

Nothing further appears of record in said cause until January 4, 1877, when the plaintiff caused a general execution to be issued upon said judgment, directed to the sheriff of Bremer county, who levied upon sufficient property of the defendant to satisfy the same.

On the 14th day of May, 1877, the defendant filed in said court a motion for an order correcting the judgment rendered at the June Term, 1858, so that the same shall be a judgment *in rem* against the property attached in the action and not a personal judgment against the defendant, and for a further order recalling the general execution and directing the release of the levy made by the sheriff of Bremer county, for the reasons set forth in affidavits accompanying the motion, and upon all the papers filed in said case. The motion was submitted to the court upon affidavits filed by defendant, and counter affidavits filed by the plaintiff.

Said motion was overruled, and defendant appeals.

*Boies & Couch*, for appellant.

*Clelland & Eaton*, for appellee.

ROTHROCK, CH. J.—I. We have not set out the affidavits in support of, and against the motion to correct the judgment

## Mayfield v. Bennett.

and quash the execution, because we think the question presented must be determined upon the record of the judgment, and upon that alone.

That part of the motion which asked a correction of the judgment by an alteration of the record entry was properly overruled, but, in our opinion, that part which prayed for an order recalling the execution and releasing the levy, because of what was apparent of record in the action, should have been sustained.

1. JUDGMENT :  
must be con-  
strued in light  
of record

The judgment in controversy is not a personal judgment when examined in connection with the whole record in the action.

The court adjudged "that service of notice had been made upon said defendant." This adjudication is certainly conclusive.

It is conclusive that service was had in some manner provided by law. The usual method is by personal service, and in the absence of any record showing service by publication, no doubt such a presumption would obtain, but the papers in this case show that the service was by publication, and the adjudication must be understood to be in harmony with the whole record in the case. It would be a most violent and unwarrantable presumption to hold that the court found the defendant was personally served in face of the fact that the affidavit that the defendant's residence was unknown, and could not with reasonable diligence be ascertained, and the proof of publication with the original notice attached, were made and filed on the very day the judgment was entered. The judgment entry must be construed in the light of the entire record. *Fowler v. Doyle*, 16 Iowa, 534. "No presumptions in support of the judgment are to be allowed in opposition to any statement contained in the record. If an act be stated in the roll as having been done in a specified manner, no presumption arises that at some future time the act was done in a better or more efficient manner. If it appear that the process was served in a particular mode, no other or

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different service can be presumed." Freeman on Judgments, § 125, and authorities there cited.

II. The judgment being *in rem* it had no binding force only as against the attached property. Upon such judgment, the property of the defendant, other than that which was attached, cannot be sold, nor does it operate as a lien thereon. *Banta v. Wood*, 32 Iowa, 469.

III. It is urged by counsel for appellee that by filing the petition to have the judgment set aside, and afterward filing a motion to change the venue, the defendant appeared to the merits, conferred jurisdiction, and cured defects, if any, in the judgment.

There were no defects in the judgment to be cured. It was a judgment *in rem*, and had no other force or effect. The appearance of the defendant, by filing a petition to vacate it, does not, in the absence of any action upon his petition, give the judgment more force, or make it different from what it was before. If it was *in rem* only, it so remained after the petition to set it aside was dismissed. We have found nothing in the authorities cited by counsel for appellee inconsistent with these views.

We conclude that the court below should have ordered the property levied upon to be released, and the general execution returned.

**REVERSED.**

## VANDERCOOK v. BAKER ET AL.

48	199
99	616
48	199
119	187

1. **Mortgage: TRANSFER OF: PROMISSORY NOTE.** The transfer of a promissory note carries with it the mortgage executed to secure it, and the mortgagee, after the transfer of the note, has no such control over the security that he can discharge or impair it to the prejudice of the transferee.
2. ———: **RECORDING OF: EVIDENCE.** Where a party testified that at the time of filing a mortgage for record no other incumbrance upon the property appeared of record, while the recorder testified that the entry of another mortgage, prior in date and appearing to be of prior record, had previously been made, and under his supervision, *held*, that the presumption in favor of the record would prevail.
3. ———: **PROMISSORY NOTE: FRAUD.** The assignee of the promissory note is not chargeable with the fraud of the mortgagee in procuring the registry of a mortgage executed to secure it.
4. ———: **PRIORITY.** A mortgage containing covenants of warranty does not take priority over one of earlier registration which contains no such covenants.

*Appeal from O'Brien Circuit Court.*

THURSDAY, APRIL 18.

ACTION in chancery to foreclose a mortgage upon real estate by a transferee thereof. The petition shows that by an instrument duly recorded, it is claimed the mortgage was satisfied and the lien thereof discharged, but alleges that it has no such effect, for the reason that the plaintiff acquired the mortgage by a transfer from the mortgagee before the attempt to discharge the lien of the mortgage. Frederick Wells is made a defendant, and it is alleged that he holds a mortgage which is a lien inferior to plaintiff's mortgage. Wells, by a cross-petition, claims his mortgage to be the first lien and asks that it be foreclosed. The mortgagors made default. The cause was submitted to the court upon written evidence, under an order made at the appearance term, and a decree

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Vandercook v. Baker.

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was rendered foreclosing both mortgages and declaring Wells' mortgage to be the prior lien.

Plaintiff appeals.

*Eugene Coxles and Joy & Wright*, for appellant.

*Chase & Taylor and E. B. Soper*, for appellee.

BECK, J.—I. The contest in this case is between two mortgagees, to determine which one of them holds the paramount lien, and is to be settled mainly upon the testimony relating to one or two points of the case. The questions of law involved in the case, we think, will present no great difficulty in their solution.

Baker and wife executed to Inman a mortgage to secure certain promissory notes. The records of the county show that the mortgage was filed on the 3d day of November, 1874. On the 17th of the same month Inman gave the notes to plaintiff as collateral security upon an indebtedness held by plaintiff against him, and, on the same day, confessed a judgment thereon. Subsequently, and after this suit was commenced, plaintiff caused the notes to be sold upon an execution issued on the judgment, and became purchaser thereof.

On the 9th day of November, 1874, Wells took a mortgage from Baker and wife upon the same land described in plaintiff's mortgage, to secure money loaned to Inman. Prior to the loan Inman exhibited an abstract to Wells' agent upon which the mortgage securing the notes transferred by him to plaintiff did not appear. He undertook to give a first mortgage security for the money borrowed, and represented the land to be free of incumbrances, except such as were to be discharged by the money borrowed of Wells. Of the fraud of Inman in this transaction, there exists no question. It is not shown that plaintiff had notice thereof, and it appears that when he received the notes as collateral security he had

## Vandercook v. Baker.

no other notice of the transaction than was derived from the record of the mortgage to Wells.

On the 25th day of December, 1874, Inman, upon the application of an agent of Wells, executed a release of the mortgage securing the notes transferred to plaintiff. This was done without the authority, assent or knowledge of plaintiff.

II. Plaintiff insists that the satisfaction of the mortgage by Inman was void. This branch of the case first demands our attention.

The transfer of a promissory note carries with it a mortgage executed for its security. The mortgagee, after transfer of  
 1. MORTGAGE: the note, has no such control over the security  
 transfer of; that he can discharge or impair it to the prejudice  
 promissory note. of the transferee. These are familiar rules. The satisfaction  
 of the mortgage being without authority or assent of Wells was, as to him, void.

III. But Wells insists that the testimony establishes the fact to be that plaintiff had not received the note as transferee at the time the discharge of the mortgage was entered. His agent, who procured from Inman the discharge, testifies with some degree of positiveness, that, at the time, the notes were exhibited to him by Inman. He did not read them, nor have them in his hands, but he thinks the notes were shown to him. On the other hand, plaintiff testifies that he received the note in December before the release was executed. Another witness, with more explicitness and equal positiveness, testifies to the same facts. The preponderance of the testimony very satisfactorily establishes the truth to be, that plaintiff had received the notes before Inman discharged the mortgage.

IV. Wells insists that the proper index of the mortgage book did not, at the time his mortgage was filed, exhibit the  
 2. —: record. mortgage under which plaintiff claims. He sup-  
 ing of: evi- ports this position by the testimony of another  
 dence. agent, (one who examined the records and took the mortgage,) who testifies, with confidence and positiveness, that the index

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Vandercreek v. Baker.

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did not, at the time Wells' mortgage was filed, contain an entry of plaintiff's mortgage. He is not corroborated by other witnesses or by established facts. The position of plaintiff, on this point, rests upon his unsupported testimony. In opposition to this witness we have the record itself, and the testimony of the recorder. While it cannot be denied that the record may be impeached by oral testimony, and that the testimony of one witness only would authorize us, in the absence of conflicting proof, to hold the index to be false and fraudulent, yet, it is true, that in such a case we must act with great caution and only upon clear and satisfactory evidence. The solemnity of the record, and the danger to the rights of property which would result from setting it aside, demand that clear and satisfactory proof be required to impeach it. The recorder testifies in this case that the entry of the mortgage in the index was made in his presence and under his supervision. He is unable to state, upon his independent memory, that it was made on the day the mortgage was filed. He states that his habit was to index all instruments upon receiving them, and that his belief is the index entry of the mortgage was made on the day the record imports. There is no ground for doubting the intelligence and honesty of this witness. It is not to be denied that if the entry was made after Wells' mortgage was filed, six days subsequent to the filing of plaintiff's mortgage, the fact was not known, or was forgotten by the recorder. This is incredible. The business of his office does not appear to have been large. He certified to an abstract about one month after Wells' mortgage was filed, showing it to be the second lien; a few days thereafter the release of plaintiff's mortgage was filed, and there seems to have been controversy from thenceforward in regard to the priority of the liens. The transaction, if the index is false, would not have escaped the attention of a man of ordinary intelligence and watchfulness; such a man we must presume the recorder to be, and the testimony exhibits nothing to rebut such presumption. If he knew at the time the index entry was

made that it was false, it could not have escaped his memory, if ordinarily retentive. There is nothing to warrant the conclusion that his memory is not as good as that of other men. Now here is a public officer charged with the duty of making a record entry, who testifies that it was made in the usual course of the business of his office, which required it to be made on the day the record purports to have been entered; that he was personally present when it was made; that he has no knowledge of any error in the index, and believes it to be correct and to have been made upon the day shown therein. There is no suspicion resting upon his honesty, and no ground to doubt his intelligence or the accuracy of his memory. His testimony, negative though it be in character, gives such support to the record that it cannot be overthrown by the uncorroborated statement of one witness.

V. The notes were first delivered to plaintiff as collateral security. He finally claims, in an amended petition, the absolute title to the notes acquired under a sheriff's sale. Wells now insists that the title was not passed by the sale. Let this be admitted. What, we must then inquire, is the interest which plaintiff holds in the notes? He has possession of the notes which were received as collateral security. If the sale is void, he is not, in the absence of fraud on his part, and of complaint on the part of the makers of the notes, to be regarded as having no interest in them, but will be presumed to hold them under the original agreement as collateral security. This conclusion disposes of this point of the case.

VI. It is said that as the notes were negotiable and delivered to plaintiff without indorsement, he holds them as assignee, subject to all equities between the original parties. Let this be admitted. It does not appear that the makers of the notes hold any equities against the payee. It is not shown that they were given without consideration, or that any defense exists against their enforcement, if, indeed, it exists in this case, where the makers urge no defense.

The equities of which the assignee is presumed to have

3. —: prom-  
issory note:  
fraud.



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Vandercook v. Baker.

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notice are those between the parties, which may be in the nature of defenses to the enforcement of the notes. The equities which Wells urges in this case are not against the validity of the notes. It is an equity against the maker in favor of a stranger to the notes, and does not involve the notes themselves, but the lien of a security therefor. That lien subsists, not through the note, but through the record of the mortgage.

The notice upon which Wells relies arises under rules peculiarly applicable to the transfer of contracts. The notice which will determine the priority of a mortgage arises under the statute applicable to the registry of instruments affecting real estate. Now it cannot be that fraud of a mortgagee, in procuring the registry of a mortgage, will affect the right of the holder of a promissory note to enforce it. The rules of the law will not imply that the assignee has notice of matters other than those between the parties. *Crosby v. Tanner*, 40 Iowa, 136. The holder of the note may enforce it. If this be so, he may enforce the mortgage, for it accompanies the debt and exists while the debt exists. If the plaintiff may recover on the note he may also enforce the mortgage.

What notice does the record of the mortgage impart? That it was filed on a certain day. From that day, if sufficient in other respects, it becomes a lien. The record imparts no notice as to the circumstances under which the mortgage was executed and delivered.

The plaintiff, as assignee, must take notice of equities affecting the validity of the note existing between the original parties; but he is not presumed to have notice of the equities of third persons against the security of the note.

We conclude that plaintiff is not chargeable with the fraud of human in putting the mortgage under which plaintiff claims upon the record, so that it became a prior lien to Wells' mortgage. This is the fraud which Wells claims defeats plaintiff's mortgage.

VII. It is insisted that the notes were passed to plaintiff

without consideration. We do not so understand the case. Inman, the record shows, did owe plaintiff, and, as we have seen, plaintiff, if he does not own the notes absolutely, holds them as collateral security upon his claims against Inman.

VIII. Wells insists that the transfer of the notes conveyed to plaintiff the equitable title only: that he held it by an *equitable assignment*, which would not convey with it the mortgage. The plaintiff holds as an assignee by delivery. It cannot be said that he holds under an equitable assignment. The assignment is sufficient in law to transfer the note, subject, however, to the equities of the other party.

IX. Wells insists that, as fraud has been shown on the part of Inman, plaintiff must show that he took the note without notice of the fraud and for value. This rule would be applicable if the fraud complained of was in the note. It is in putting the mortgage upon record so that it became the first lien, and does not pertain to the note. The burden is upon Wells to show plaintiff's knowledge of the fraud, not upon plaintiff to show that he had no notice thereof.

X. It appears that Wells' mortgage contains covenants of warranty, while the other mortgage does not. It is insisted that plaintiff, therefore, had notice that Wells' mortgage was to be regarded as a prior lien by the parties. We discover no reason to support this conclusion. The priority of the mortgages is to be determined by their registration, not by their form or provisions. We have never heard that covenants in a mortgage would impart notice that it should be treated as a lien prior to other instruments filed before it.

XI. Objections to plaintiff's right to enforce his mortgage, founded upon the form of the acknowledgment, and the fact that the date of Wells' mortgage was prior to the day plaintiff's was recorded, are urged upon our attention. It is sufficient to say that the acknowledgment is sufficient, and that if plaintiff had notice that Wells' mortgage was executed before his own, the record informed him that it was subsequently filed for record, which determined that it was a junior lien.

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Independent District of Crocker v. Independent District of Ankeny.

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We have considered all questions raised in this case, and conclude that plaintiff's mortgage is the prior lien and should be so enforced. The decision of the Circuit Court is reversed, and the cause will be remanded for a decree in harmony with this opinion.

REVERSED.

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INDEPENDENT DISTRICT OF CROCKER v. INDEPENDENT DISTRICT  
OF ANKENY.

1. **Practice in the Supreme Court: ASSIGNMENT OF ERRORS.** An appeal will be dismissed if the assignment of errors is not served on the appellee ten days before the first day of the trial term. Whether or not it must be filed with the clerk previous to the day devoted to consideration of causes from the district whence comes the appeal, *quere*.

*Appeal from Polk Circuit Court.*

THURSDAY, APRIL 18.

ACTION at law. Trial by the court, and judgment for the plaintiff.

The defendant appeals.

*Barcroft, Given & Drabelle*, for appellant.

*McHenry & Bowen*, for appellee.

SEEVERS, J.—The trial term of this court, for this cause, commenced on the 3d day of December, 1877, and no assignment of errors was filed with the clerk and served on the appellee or its attorney, until the 8th day of said month. A motion has been made to dismiss the appeal because such assignment was not sooner filed and served on the appellee.

Section 3183 of the Code is as follows: "If, the transcript

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Independent District of Crocker v. Independent District of Ankeny.

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being filed, errors are not assigned and filed with the clerk of the Supreme Court, and a copy of the same served on the appellee or his attorney ten days before the first day of the trial term, the appellee may have the appeal dismissed, or the judgment or order affirmed, unless good cause for the failure be shown by affidavit."

Rule 24 of this court provides, "If, the transcript and abstract being filed, errors are not assigned by the morning of the first day devoted to causes from the district whence comes the appeal, the appellee may, on motion, have the appeal dismissed, or the judgment or order affirmed, unless good cause for the failure is shown by affidavit."

There is an apparent conflict between the statute and the rule, unless it can be held the court can dispense with filing an assignment of errors previous to the day devoted to a consideration of causes from the district whence comes the appeal. And if the errors are served on the appellee by the time required by the statute, it would seem he could not justly complain of the mere non-filing of the same with the clerk. We are not prepared to say he would suffer any prejudice by the failure to file as the statute provides. It is unnecessary to determine this question, and we do not do so. It is clear, however, the rule is based on the foregoing theory, for it makes no provision as to the service of the errors on the appellee. The statute, therefore, clearly governs, and as the objection has been made and is insisted on, we have no discretion in the premises, and the motion must be sustained. The result would be the same if the "first day devoted to causes from the district whence comes the appeal," be held to be the first day of the trial term, because such day was the 15th day of December, 1877, and the errors were not served on the appellee until the 8th day of said month, or less than ten days previous thereto.

APPEAL DISMISSED.

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Grimes v. Simpson Centenary College.

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## GRIMES v. SIMPSON CENTENARY COLLEGE.

1. **Contract:** PAROL MODIFICATION: PRINCIPAL AND AGENT. Where a contract has been reduced to writing, a party thereto is not authorized to rely upon the statements of the agent of the other party to the contract, varying or modifying its terms.

*Appeal from Warren Circuit Court.*

THURSDAY, APRIL 18.

ACTION to recover upon a contract made by the defendant with one Reichard for the plaintiff's benefit. Reichard had entered into a contract to erect a college building for the defendant. After a part of the work had been performed, he became embarrassed. He was owing several laborers who had done work on the building, and was unable to pay them. The plaintiff was one of the laborers. Reichard owed him \$165.50, the amount claimed in this action. To enable Reichard to go on with the work, the defendant assumed in writing the payment to the laborers of the sum of \$1,572.59. The amount due each was not then ascertained. As soon as the respective amounts were ascertained, which appears to have been very soon after the execution of the contract above referred to, Reichard gave orders upon the defendant's treasurer to the laborers respectively for the respective amounts due them. He gave an order upon the defendant's treasurer to the plaintiff for the said sum of \$165.50. The order was presented to the treasurer and was not paid. The treasurer, however, wrote upon it an acceptance, which is in these words: "I hereby accept the within order to be paid when J. Reichard finishes the work upon the Simpson Centenary College according to his contract." The plaintiff declined at first to receive the order with such acceptance indorsed thereon, and left it for a short time in the treasurer's hands. He declined upon the ground that the defendant had entered into an un-

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Grimes v. Simpson Centenary College.

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conditional agreement to pay the laborers at once the amount stipulated. He then went to one Griffith, who was acting as agent for the defendant, and asked him for an explanation. Upon this point his testimony is in these words: "I went to him (Griffith) for an explanation of this order. He told me that it was all right, that this was in order to give them time to the following spring, for if they paid these orders forthwith it would cripple them so that they would not be able to inclose their building during the winter, and it would be injured, and the object was to leave it until spring so as to help them out that winter; that that was the understanding and object of the indorsement on the back of the order. I told him if that was the case, and I knew that to be the case, I was willing to take the order and wait until May or June for the money." The plaintiff then took the order with the qualified acceptance upon it. Reichard failed to finish the work, and the defendant refuses to pay upon that ground, claiming that the original contract was modified or superseded by the order and acceptance, and that under the order and acceptance nothing is due the plaintiff.

The plaintiff claims that the original contract was not modified nor superseded by the order and acceptance; and he further claims that if such would be the legitimate effect, he was fraudulently induced to take the order with such acceptance upon it, and that he should not be bound thereby. There was a trial by jury, and verdict and judgment for the plaintiff.

Defendant appeals.

*Phillips, Goode & Phillips, and Henderson & Berry, for appellant.*

*J. S. Clark and Bryan & SeEVERS, for appellee.*

ADAMS, J.—The defendant asked the court to instruct the jury that if the order was drawn by Reichard upon the defend-

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## Grimes v. Simpson Centenary College.

ant's treasurer for the money sued for, and the plaintiff  
 1. CONTRACT: received the order with the indorsement shown  
 parol modification: principal and agent. thereon, and has ever since held the same, he could  
 not recover until Reichard had completed the building under his contract with the defendant, as in the indorsement upon such order provided. The court refused to so instruct, and the refusal is assigned as error.

Conceding that the original contract contained a promise to pay the laborers unconditionally and immediately, no names of payees nor sums as due to each being designated, it was competent, of course, for the plaintiff to waive the benefit of such promise in consideration of a promise to pay him specifically a specified sum, even though the payment was deferred and made conditional. As to whether the plaintiff was wise in doing so is a matter with which we are not concerned. We do not, indeed, understand the counsel for plaintiff as strenuously insisting that the order and acceptance thereon received and held by plaintiff would not express the contract between the parties if such order and acceptance are in force. But they seem to rely mainly upon showing that they are not in force. They claim that the plaintiff was induced to receive the order so accepted by the defendant's fraud. We come, then, to consider whether the defendant was guilty of fraud. The fraud, if any, was perpetrated by Griffith, and in the use of the words which we have set out in the statement of facts as testified to by Grimes. Griffith, it is claimed, put a false and fraudulent construction upon the acceptance which had been indorsed upon the order. The plaintiff claims that he understood from what Griffith said that the money would be payable in the spring. But it is impossible to suppose that he was made to believe that the terms of the acceptance made the money payable in the spring. He had full knowledge of what the acceptance was, and he cannot be allowed to say that he was led by Griffith to put a meaning upon the words used, of which they are by no possibility susceptible. The fact doubtless is that he relied upon what Griffith said as

## Denison v. Crawford County.

an agreement outside of the acceptance. His counsel speak of him in their argument as "an humble stone mason, unaccustomed to interpreting written contracts, unfamiliar with the rules and customs regulating commercial paper, and dealing with a religious corporation represented by a man of ability and experience." If this is so, it is easy to believe that he attached more importance to what Griffith said than to the terms of the acceptance; but we are not allowed to sustain him in such reliance, nor can we hold a promise, unperformed, without something more, to be fraudulent. We think the instruction asked should have been given.

REVERSED.

## DENISON V. CRAWFORD COUNTY.

48	211
114	615

1. **Contract: SWAMP LANDS: PUBLIC POLICY.** A contract between a county and an agent provided that the latter should be authorized to make the proper application to the general government for its swamp lands, or indemnity therefor, and that he was to receive one-half of what he thus procured for his services. To effect the object of his contract, certain congressional action became necessary, which he aided in procuring by legitimate means: *Held*, that the contract was not void as against public policy, and that a county may lawfully employ agents for such purpose, and an agreement to pay them is valid.

48	211
139	494

*Appeal from Greene Circuit Court.*

THURSDAY, APRIL 18.

THE plaintiff and defendant entered into the following contract. "This contract or article of agreement made and entered into this 4th day of January, 1871, by and between the county of Crawford, in the State of Iowa, by the board of supervisors, this day in session in said county, of the first part, and Jesse W. Denison, of the same county, of the second part, witnesseth: That, whereas, the said county has never as yet



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Denison v. Crawford County.

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received any benefit from the act of Congress known as the Swamp Land Act (of September 18, 1850), and, whereas, said Denison is willing, at his own expense, to inquire into the merits of the case, and if by him deemed such as to justify an effort to secure to the said county an interest justly due, to make such survey of lands in said county as may be necessary for a proper showing to the proper department at Washington for securing the claim ;

“Wherefore, it is hereby agreed that the said Denison is at liberty, at his own expense and personal responsibility, to make such survey as above named, and to press such claim upon the attention of the government as to him may seem necessary for securing the claim, provided he takes no steps nor measures that shall in any way make the said county liable for costs, directly nor indirectly, in the matter. And that if he succeeds in thus securing anything—money or land warrants—from the general government for the benefit of said county, he is to have for his trouble and expense one-half of the gross receipts, after deducting in his favor the expense of said survey, provided such expense shall not exceed the sum of five hundred dollars, and that no arrangement is to be made by said county with any other person or party for securing such swamp land claim till the said Denison shall have a reasonable length of time—at least five years—for securing the object herein contemplated. Also, that if in the prosecution of the work it should become necessary for the county to authorize the survey or to sanction it after surveyed in any way whereby liability may attach to the county for the expense of the survey, that the said Denison is to give security or bonds for such expense.”

The petition states that in pursuance of said contract the plaintiff undertook and successfully prosecuted the claims therein referred to, whereby the defendant had received a large sum of money. This action is brought to recover the compensation provided in the contract, and for expenses as therein contemplated.

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Denison v. Crawford County.

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The answer consists of a general denial, and alleges the contract is champertous and void as against public policy. There was a trial by jury, verdict and judgment for the plaintiff, and defendant appeals.

*E. W. Sargent, Tabor & Tabor, and Jas. A. Henderson, for appellant.*

*Harvey & Lehmann, for appellee.*

SEEVERS, J.—At the time the contract was entered into, the defendant was entitled, under the acts of Congress of September 28, 1850, March 2, 1855, and March 3, 1859, and certain acts of the General Assembly of this State, to the swamp lands within the county, upon due proof being made of their swampy character before the officers of the general government, whose duty it was to pass on the sufficiency of the proof.

Selections had been made, lists prepared, and proof made, but it was held by said officers that the lists were not properly filed, and said officers refused to pass upon the selections or as to the sufficiency of the proof.

Such selections, lists and proof belonged to the Emigrant Company by whom they had been procured. There is no evidence tending to show that at the time that contract was made either of the parties to the action had any knowledge such lists and proof were on file.

Soon after the contract was made the plaintiff employed one Skinner to aid or assist him in the prosecution of the claims and it is claimed that Skinner, by his personal influence or otherwise, aided in procuring the passage by Congress, on March 5, 1872, of the following act or law :

"Be it enacted, etc., That the Commissioner of the General Land Office is hereby authorized and required to receive and examine the selection of swamp lands in Lucas, Dickinson, O'Brien, and such other counties in the State of Iowa as for-

## Denison v. Crawford County.

merly presented these selections to the Surveyor-General of the district including that State, and allow or disallow said selections and indemnity provided for according to the acts of Congress in force touching the same at the time such selections were made, without prejudice to the legal entries or rights of *bona fide* settlers under the homestead and pre-emption laws of the United States prior to the date of this act."

Under the provisions of this law the officers charged with that duty proceeded to do what they had refused to do. That is, they examined the selections and lists, as also the proofs as to the character of the lands, and determined the defendant was entitled to a certain amount of money which was passed over to the county. Such are the main and leading facts. The law of the case remains to be determined.

It was held in *Allen v. Cerro Gordo County*, 34 Iowa, 54, that the counties in this State had and possessed the requisite power to enter into contracts like the one in question.

As to the amount of the recovery, and the manner the case was submitted to the jury with reference thereto, we are unable to say there was any error.

The main, and with propriety it may be said, only question presented and discussed by counsel, is that the contract is void because against public policy—its tendency being to corrupt the county authorities, the legislation of Congress, and officers of the government.

There is nothing on the face of the contract that indicates that corrupt or improper influences were to be used, unless a strained construction of the words is adopted. Looking at the contract alone, there is nothing to indicate any means were to be used except those which were fair and legitimate. The circumstances surrounding the contract and its execution should be examined for the purpose of its proper interpretation. But there is no testimony tending to show that Denison or the county authorities contemplated the use of any means which were not legitimate. It does not appear that either party to the transaction knew or supposed an act of

1. CONTRACT:  
swamp lands:  
public policy.

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Denison v. Crawford County.

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Congress was required, or in fact that anything was necessary except to bring the claim in a proper manner before or to the attention of the proper officers.

Congress had recognized the fact that the defendant was entitled to the swamp lands within its borders, and if the same had been sold, to money in lieu of such. Before this claim, however, could be recognized or made available, certain things had to be done by the county. As it turned out after the contract was made, it became necessary to bring the matter to the attention of Congress and obtain further legislation.

It was perfectly competent for the county to employ agents or attorneys for this purpose, and an agreement to pay them therefor is valid. Such agents may lawfully draft "the petition to set forth the claim, attend to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced." SWAYNE, J., in *Trist v. Child*, 21 Wall., 441.

If, however, the agent or attorney conceals from the members of Congress the capacity in which he is acting, or appears to be other than he actually is, legislation procured thereby may be said to have been obtained by improper means, and a contract to pay a compensation therefor is void as against public policy. *Marshall v. Balt. & Ohio R. R. Co.*, 16 How., 314.

In these cases, and all others of a like character to which our attention has been called, either the contract on its face, or when viewed in the light of the circumstances surrounding the transaction, clearly disclosed the fact that improper means and influences were to be used to accomplish the desired end. The parties so contemplated and contracted accordingly. Nothing of the kind appears here, and if this contract be declared void, then it will be difficult, if not impossible, to make one providing for the compensation of an agent or attor-

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Henderson v. The C., R. I. & P. R. Co.

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ney who may be employed to prosecute claims before any department of the government. Conceding it to be proper to look at what was done by Skinner when at Washington City, endeavoring to obtain the passage of the act of Congress of March 5, 1872, for the purpose of arriving at the design and intent of the contract (which we very much doubt), still we are unable to say anything was done by him that was improper to accomplish that result.

There is nothing which tends to show he used any means except such as were calculated to appeal to the reason and judgment of the members of Congress.

Agents of this State and of Missouri, together with persons employed by other counties, were in Washington endeavoring to accomplish the same result. By their combined efforts, and the justice of the measure asked, they were successful. Without any serious doubt we think Mr. Skinner claims fully as much credit, if not much more, than he is fairly entitled to.

**AFFIRMED.**

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**HENDERSON v. THE C., R. I. & P. R. Co.**

1. **Evidence: TRIAL: PRACTICE.** Where upon the second trial of a case the parties agree that the reporter's notes of evidence upon the former trial may be used, it is competent for the plaintiff to withdraw any portion of the testimony offered by him upon the former trial, unless the defendant is prevented from introducing the evidence so withdrawn in his own behalf.
2. **—: LIMITATION OF: PRACTICE IN SUPREME COURT.** Where a party objects to the admission of testimony generally, and the court thereupon admits it, but limits its effect, the party objecting cannot be heard on appeal to complain of the action of the court in thus limiting its effect.
3. **Railroads: PRIVATE CROSSING.** A railroad company whose line runs through the land of an owner is only required to provide a crossing for such owner when his interest and convenience require it.

*Appeal from Polk District Court.*

THURSDAY, APRIL 18.

ACTION to recover double the value of a mare killed on the defendant's road in August, 1872. Jury trial, verdict and judgment for plaintiff. The defendant appeals.

*Wright, Gatch & Wright*, for appellant.

*Phillips, Goode & Phillips*, for appellee.

SEEVERS, J.—This is the third time this cause has been before this court. It will be found reported in 39 Iowa, 220, and 43 Id., 621, where will be found a pretty full statement of the facts. The evidence on all these trials was the same except as herein otherwise appears.

We judge from the abstract and concessions of counsel that the evidence on the first trial was taken down and extended by the short-hand reporter, and the same was on each subsequent trial read to the jury.

The fact that the mare was killed by a train on the defendant's road has at no time been controverted, but whether the defendant was liable therefor has at all times been seriously questioned.

The road was fenced, but there is a private crossing over it and gates provided thereat for the use of one Harvey, on whose land the crossing is situated.

The liability of the defendant depends on the care exercised in keeping the gates closed.

It was substantially held in 39 Iowa, 220, that the defendant was not liable for the negligence of Harvey, for whose accommodation the crossing was provided, and when a private crossing is necessary to enable a proprietor through whose premises the road is located to reach a highway or adjacent parts of his premises, that the company was under a legal

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Henderson v. The C. R. I. & P. R. Co.

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obligation to furnish it. But it was not determined, and never has been by this court, that the company was required to provide such crossing with gates or bars, unless required or requested to do so by the owner of the premises.

This ruling was affirmed in 43 Iowa, 621, and it was also held the defendant was only required to exercise ordinary care to keep the gates closed, and that the action of the owner of the premises in forcibly opening the gates, after they had been nailed up by the defendant, sufficiently indicated he required the crossing, and that an instruction which submitted the question to the jury as to whether Harvey required the crossing was erroneous, because there was no evidence to warrant it.

Such being the status of the cause when the present trial took place, we turn our attention to the errors assigned which have been discussed by counsel.

I. The whole, or a portion, of the testimony of one Houghan having been read to the jury by the plaintiff, the

1. EVIDENCE: abstract states in reference thereto the following:  
trial: prac-  
tice. "After reading this far the plaintiff moved to withdraw that portion of witness' testimony relating to the nailing up of Harvey's gates, to which defendant objected. Motion sustained, evidence withdrawn from the jury, and defendant excepted."

It is not, of course, disputed that plaintiff did not have the right to introduce such legal evidence as he saw fit, or, after having introduced it, to withdraw the whole or any part thereof from the jury, unless the defendant was prejudiced thereby, or prevented from introducing the evidence so withheld or withdrawn in its own behalf.

The abstract fails to disclose any reason why the defendant could not at the proper time have introduced the evidence withdrawn. The fact (if it be one) that plaintiff saw proper to introduce the evidence on a former trial and that he relied thereon as a basis for a recovery, did not require him to take the same course on any succeeding trial. In other words, he

could change front, and the defendant has no legal ground of complaint, unless there was a deprivation of a legal right, which in this case there was not.

II. The testimony of Harvey was introduced by the defendant, but a part of the cross-examination which tended to show he cut down the gates after they had been nailed up was objected to by defendant, because the same was "immaterial, indefinite; and not proper cross-examination." The abstract states in reference thereto: "Objection overruled, the court saying: 'It will be admitted simply as tending to show the improbability of Harvey's closing the gate himself.'" It is now urged the court erred in limiting the testimony as above stated. This may be conceded, and then the inquiry becomes exceedingly pertinent: Is the defendant in a position to *now* and *here* urge this objection?

Here is another change of front, for the defendant complains of an error caused by its objection. The presumption must be, if no objection had been interposed, the evidence would have been admitted for any and all purposes.

It is not insisted the evidence was inadmissible for the purpose indicated and to which it was limited by the court, but the point is made that it was admissible as tending to prove Harvey required the defendant to provide the crossing and gates. On every fair principle of justice and right, the defendant should be estopped from now urging and claiming a reversal because of this error. Otherwise the reversal would be caused by an error occasioned by the act of the party claiming the benefit thereof.

III. The defendant asked the following instruction:

"2. By the law and statutes of Iowa, where a railroad runs through the improved land of any party, or between the residence of said party and a public highway, the company building said railroad is required to furnish to said party an adequate means of crossing the railroad track, and if the same is fenced, proper entrances through said fences to said crossing."

2 —: Limitation of: practice in the supreme court.

3. RAILROADS: private crossing.



Which was refused and the following given :

"13. Where any person owns land on both sides of a railroad, it is the duty of the corporation owning such railroad to make and keep in good repair one causeway or other adequate means of crossing the same, when required so to do."

"14. The mere fact that the owner of lands lying on both sides of a railroad has a lane leading from his house and other farm buildings to a public highway, and thence across the railroad to his lands on the other side, will not excuse or release the corporation owning the railroad from the duty of putting in and keeping in good repair a private crossing, when requested so to do by such land owner."

The Rev., § 1329, provides : "Where any person owns lands on both sides of any railroad, the corporation owning such railroad shall, when required so to do, make and keep in good repair one causeway or other adequate means of crossing the same."

The instruction refused is based on the theory that the defendant was required to provide a crossing whether the land owner required it or not. The statute will not bear such construction.

The legal obligation exists only where the land owner requires the crossing for his accommodation.

The instructions given are based on the correct theory. The crossing is for the benefit and accommodation of the proprietor of the premises, and unless he requires it, the company is under no obligation to furnish it. Such we understand to be the ruling in New York, under, in this respect, a similar statute. *Spinner v. N. Y. C. & H. R. R. Co.*, 67 N. Y., 153.

IV. Several instructions were asked by defendant as to the care required on its part, which were refused.

The rule contended for and therein set forth was that of ordinary care. The instructions given by the court enunciate the same rule, clothed, it is true, in somewhat different language, but the meaning is substantially the same. The defendant was not, therefore, prejudiced in this respect.

## State v. Stanley.

V. It is claimed there is no testimony tending to show but that the gates were closed on the evening in question, and consequently they must have been opened during the night and left open by some one other than employes of defendant. A witness testified: "I had been at Harvey's the night before the accident, when I had been through the private crossing. I did not shut the gates when I went through that night; I did not open them." It is true it does not clearly appear that witness opened the gates or found them open, but he went "through the crossing." This, however, if there was no other testimony, and it is claimed there was, is sufficient to justify the submission of the question as to the gates being open to the jury.

A careful reading of the whole testimony satisfies us the verdict is not so clearly against the weight of the evidence as to justify us in setting it aside for that cause. In so holding we must not be understood as overruling *Aylesworth v. The C. R. I. & P. R. Co.*, 30 Iowa, 459, or in the slightest degree impugning the rule there laid down.

**AFFIRMED.**

THE STATE V. STANLEY.

1. **Criminal Law: EVIDENCE.** The ownership of property need not be established in the party from whom it is alleged to have been stolen, if it is shown to have been in his possession, and to have been stolen therefrom.
2. **—: AIDING AND ABETTING.** A person is guilty of aiding and abetting a larceny if, in accordance with an agreement therefor, he takes care of the family of the felon while the latter is disposing of the stolen property.
3. **Practice: SIGNING INSTRUCTIONS.** The statute (Code, § 4440) requiring that the instructions be signed by the judge is directory, and the failure to comply therewith will be held to be error only when the party complaining is prejudiced thereby.
4. **Criminal Law: EVIDENCE: CORROBORATION.** The corroboration of the testimony of an accomplice is not limited to the testimony of witnesses, but may be circumstantial.

48	221
81	608
48	221
96	261
100	651
48	221
106	703
48	221
115	119
48	221
120	166
48	221
129	138
48	221
137	6

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State v. Stanley.

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*Appeal from Decatur District Court.*

THURSDAY, APRIL 18.

THE indictment charged the defendant with stealing two horses, the property of W. W. Westbrook, of the value of two hundred dollars each.

Having been found guilty, and sentenced as provided by law, he appeals.

*Warner & Bullock*, for appellants.

*J. F. McJunkin*, Attorney General, and *Smith McPherson*, District Attorney, for the State.

SEEVERS, J.—I. It is objected there was no evidence showing that the horses were the property of Westbrook. There was, however, evidence showing that the horses were in the possession of Westbrook, and being so, they were stolen. This is sufficient. 2 American Criminal Law, § 1824; 3 Greenleaf's Evidence, § 161.

II. The court gave the following instruction: "The aiding and abetting may consist in watching or guarding against surprise, averting suspicion against the parties while they had the property, agreeing to or taking care of the families of parties who have the property, and other similar acts." The latter part of this instruction, it is said, is clearly erroneous.

If there was evidence on which it could be based, it is without doubt correct. There was evidence tending to show that defendant knew the horses were to be stolen, and went to the place or near it, and was in a position to give the alarm, if necessary, to the persons engaged in the stealing. We think this sufficient, whether he agreed to give such alarm or not. It was for the jury to determine his object and pur-

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State v. Stanley.

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pose from the testimony, and the position, under the circumstances, in which he voluntarily saw proper to place himself. So if, at the time or before the horses were stolen, he *agreed* to take care of the families of the felons while disposing of the property, this would make him an accessory before the fact, and liable to be tried and punished as a principal. Code, § 4314. John Hatfield testified: "When we took the horses out of the stable, defendant was standing right by, watching that none came up. Defendant was to take care of our families while we were gone with the horses." We are constrained to believe this evidence fully warranted the giving of the latter part of the instruction. Besides this, the abstract shows the court gave other instructions, which might have had the effect to qualify or materially change the foregoing. Instructions must be read and construed as a whole, and error cannot be presumed, but must be affirmatively shown. Hence, all the instructions given should have been contained in the abstract, so that it could be ascertained and known there were no others which qualified those given and claimed to be erroneous.

III. The only evidence, it is urged, showing the guilt of the defendant, is that of John Hatfield, an acknowledged accomplice, and that he has not been corroborated as required by Code, § 4559. One Woodard testified that defendant was a witness when Hatfield was tried for this offense before a justice of the peace, and he gave evidence as to what the defendant then testified to. If the jury believed Woodard, and they must have done so, the corroborating evidence was full, complete, and entirely satisfactory.

IV. The defendant objected to Hatfield testifying in the case, because the minutes of his evidence taken before the grand jury were not returned with the indictment. This objection, it may be conceded, was well taken, and yet the witness was properly permitted to testify, because the amended abstract shows that a notice was served on the defendant in

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State v. Stanley.

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strict accord with the provisions of Code, § 4421, that said Hatfield would be introduced on the trial.

Appellant complains that this additional abstract was not filed in time; that the defendant has been prejudiced unjustly thereby. As he does not deny the correctness of this abstract, we are unable to concur in this view. It was filed in time for him to reply thereto, and this is sufficient.

V. Because the judge failed to sign the instructions as required by Code, § 4440, the appellant urges there must be a reversal. But he was in no manner prejudiced by such failure, and the statute is clearly directory.

VI. The abstract is somewhat obscure, but, giving the defendant the benefit of the doubt, we infer the court gave to the jury an instruction on the subject of the testimony required before the defendant could be convicted on the evidence of an accomplice, and in so doing copied Code, § 4559.

Thereupon, as explanatory of, or as an addition to, such instruction, the defendant asked the following: "The corroboration referred to in the foregoing should be by at least one credible witness. If you believe that John Hatfield was not corroborated by at least one credible witness, you should find the defendant not guilty."

This was refused. The corroboration required by the statute may be circumstantial. But it may be claimed, with a degree of propriety, at least, there was no such evidence but that, as to anything tending to corroborate Hatfield, the State had to rely solely on the evidence of Woodard, and that if he was not credible the instruction asked should have been given. There was evidence tending to impeach Woodard. But the difficulty is the residue of the instructions given by the court are not before us. We are, therefore, unable to determine that the refusal to instruct as asked was an error.

VII. It is lastly urged the evidence does not sustain the verdict. If the story told by Hatfield was believed by the jury, there is not a particle of doubt of his guilt. This wit-

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 Eckel v. Walker.
 

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ness was before the jury; he was brought from the penitentiary for the purpose of testifying; his participation in the crime was fully known and understood by the jury, and yet they must have believed him. If we could have seen him while testifying, we might have come to a conclusion different from what the jury have, but, as this cannot be, we are unable to say the jury were not warranted in believing him.

This is also true as to the trial judge. For if he did not believe the witness, it was his imperative duty to have set the verdict aside.

AFFIRMED.

48	225
92	10
48	225
1112	426

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 ECKEL V. WALKER ET AL.

1. **Practice: NEW TRIAL: TIME FOR MOTION.** The consent entered of record extending the time for filing a motion for a new trial, in the absence of any stipulation as to what causes shall be included in the motion, has the effect to extend the time for filing a motion for all the causes for which at any time a motion may be filed.
2. ———: ———: **NEWLY DISCOVERED EVIDENCE.** Facts considered which were held to constitute reasonable diligence in procuring newly discovered evidence.

*Appeal from Clayton Circuit Court.*

THURSDAY, APRIL 18.

Action upon a promissory note. The defense was payment. There was a trial by jury, and a verdict for the plaintiff. A motion for a new trial was sustained, and plaintiff appeals.

*Murdock & Larkin*, for appellants.

*James O. Crosby* and *L. O. Hatch*, for appellees.

ROTHROCK, CH. J.—I. At the trial, defendants introduced evidence tending to show that the defendant Werges, in pursuance  
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of an agreement with plaintiff, paid to one Krueger the amount due on the note in suit, and that plaintiff received one hundred dollars of the amount, and loaned to Krueger the remainder, for which he received no new obligation.

The case turned upon the question as to the payment to Krueger, and whether he received it as the agent of plaintiff. The evidence consisted principally of plaintiff's alleged admissions to the defendant Werges and his son.

These admissions were denied by plaintiff. The case was tried at the March Term, 1876. Upon the return of the verdict the following record entry was made. "By consent, motion for a new trial to be filed in 60 days—continued."

By agreement of the parties, the time for filing the motion was extended to the June Term, 1876.

On the seventh day of June, 1876, a motion for a new trial was filed, and the cause was continued to the March Term, 1877. The motion was based on two grounds, viz: *First*, that the verdict was not sustained by sufficient evidence; *second*, for newly discovered evidence as shown in certain affidavits.

When the extension of time for filing the motion was agreed upon, the plaintiff did not in terms agree to waive the manner which the law provides a party shall pursue to obtain a new trial on newly discovered evidence.

As we understand the record, the time fixed by order of the court was merely extended, without any agreement as to what the motion should or should not contain.

At the March Term, 1877, the plaintiff moved to strike out the second cause in the motion for a new trial, and the affidavits in support thereof, because the motion on the ground of newly discovered evidence was not made at the term at which the cause was tried, and within three days after the verdict, and the application for a new trial on this ground should have been by petition.

This motion was overruled, and the ruling is assigned as error.

We see no error in this. The consent entered of record that the defendants should have sixty days to file motion for a new trial, in the absence of any stipulation as to what causes should be included in the motion, extended the time for all causes for which a motion could at any time be filed. The same may be said of the extension of the time beyond sixty days.

II. It is urged that the defendants did not show that they exercised reasonable diligence in endeavoring to procure the newly discovered evidence before the trial.

The affidavit of the defendant Werges, in support of the motion, sets forth that he discovered the evidence after the trial, and that he could not with reasonable diligence have discovered it, and produced it at the trial. The evidence consists of certain material admissions made by the defendant to three different witnesses.

It is shown that two of these witnesses did not communicate the admissions to any one, until after the trial, and that the other was absent from the State when the suit was brought, and until after the trial.

It does not appear that any diligence upon the part of defendants would have discovered this evidence. They had no reason to believe that plaintiff made any such admissions to these witnesses, and it cannot be claimed that diligence requires that the defendants should have made particular inquiry of all persons within the range of plaintiff's acquaintance, to ascertain what, if any, conversations they might have had with plaintiff upon the subject-matter of the suit.

III. Lastly, it is urged that a new trial should not have been granted because the newly discovered evidence is merely cumulative. It is true certain admissions of the plaintiff were sworn to, by one of the defendants and his son, but the admissions set out in the affidavits in support of the motion, while they tend to establish the same ultimate fact,



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The Clinton National Bank v. Graves.

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are not evidence of the same kind to the same point. We need not particularize or set out the evidence.

We discover no abuse of discretion in the order granting the new trial. Appellate courts are justly much less inclined to interfere when a new trial has been granted, than when refused.

AFFIRMED.

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## THE CLINTON NATIONAL BANK V. GRAVES ET AL.

1. **Instruction: ERROR WITHOUT PREJUDICE.** The refusal to give an instruction asked, even though it correctly presents the law and is pertinent to the issues, will not justify reversal unless it appears that such refusal wrought prejudice to the appellant.
2. **Promissory Note: WHEN VALID ON ITS FACE.** A note executed on Sunday, but dated upon a week day, is valid in the hands of a *bona fide* purchaser for value before maturity.

*Appeal from Story District Court.*

THURSDAY, APRIL 18.

THE plaintiff sues Wm. L. and Augusta M. Graves, as the makers, and Silas Thomas as the indorser of a promissory note for the sum of \$175, payable to the order of Silas Thomas. The defendants, Wm. L. and Augusta M. Graves, answered, alleging that the note was executed and delivered on the 27th day of October, 1872, which was Sunday, but by mistake it was dated on and as though it was made on the 26th day of October. These defendants further allege that the note was obtained by fraud and misrepresentation, and that the consideration has entirely failed.

The cause was tried by a jury, and a verdict was returned for plaintiff for \$247.04, the amount of the note and interest. The motion for a new trial was overruled, and judgment was entered upon the verdict. Defendants appeal.

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The Clinton National Bank v. Graves.

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*J. L. Dana*, for appellants.

*McCarthy, Stevens & Underwood*, for appellee.

DAY, J.—I. The abstract states that the defendants produced witnesses by whom they offered to prove that said note was, in fact, made on Sunday, and was obtained by fraud, and without consideration, to the introduction of which witnesses the plaintiff objected, on the ground that the proposed testimony was immaterial, which objection was sustained. This ruling was clearly erroneous. But the abstract further shows that, notwithstanding this ruling, the witnesses were introduced, and they testified that the note was made on Sunday, and further testified fully as to the fraud which defendants claim was perpetrated in procuring the note. The error in this ruling was cured by the subsequent action of the parties and the court.

II. The defendant asked the court to instruct as follows:

“1. Where fraud or other illegality in the inception of a note is pleaded in an action, and supported by evidence, the burden of proof is upon the plaintiff to show that he gave value for the note, and that the plaintiff is a *bona fide* purchaser of it, before it became due.”

1. INSTRUCTION: error without prejudice.

This instruction contains a proper presentation of the law, and should have been given. *Rock Island National Bank v. Nelson*, 41 Iowa, 563, and cases cited. And yet it appears from the abstract that the defendants could have sustained no prejudice by the refusal to give this instruction. The jury found specially that the note in question was indorsed by Thomas, and transferred to plaintiff before due, and that plaintiff did not have actual notice of the alleged fraud, or want of consideration, at the time it purchased the note. There is no conflict in the evidence that plaintiff gave value for the note, and purchased in good faith. Hence, the refusal to give this instruction is error without prejudice.

III. The defendants further asked the court to instruct the jury as follows:

"2. That if the jury find that the said note was in fact made on Sunday, and the jury further find that said note was not indorsed until after it became due to the bank, the jury will return a verdict for defendants."

Without determining as to the correctness of this instruction, it is clear that the refusal to give it worked no prejudice.

The jury found specially that the note was indorsed by S. Thomas, before due. For the same reason the defendants were not prejudiced by the refusal of the court to give the third and fourth instructions asked.

IV. The defendants asked the court to instruct as follows:

"5. That if the said note was made on Sunday, the same 2. PROMISSORY note: when valid on its face. was absolutely void, and the plaintiff cannot recover thereon, and the jury will return a verdict for the defendants."

This instruction was properly refused. While the evidence shows that the note was in fact made and delivered on Sunday, the 27th day of October, yet it bore date October 26th. On its face it appeared to be valid. There was nothing in its appearance to suggest its invalidity, or to put a purchaser upon inquiry. In the hands of a *bona fide* holder for value, before due, such as the plaintiff, by the special findings and the undisputed evidence, is shown to be, it is valid, and may be enforced. *Cranston v. Goss*, 107 Mass., 439.

V. The cause was tried at the December Term, 1876. Upon the return of the verdict the defendants filed a motion in arrest of judgment, and for a new trial, assigning, as grounds therefor, the insufficiency of the evidence to support the verdict, and the error of the court in giving and refusing instructions. This motion the court took under advisement, and did not act upon until the February (1877) Term.

After this motion was taken under advisement, but before it was acted upon by the court, and, as we understand the abstract, at said February term, the defendants filed a sup-

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Brown v. Rose.

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plemental motion in arrest of judgment, and for a new trial. In this motion they claim that the petition fails to state who is the owner of the note, and that the Clinton National Bank had, under the law, no authority to purchase the note. These questions were not at any time presented to the court by demurrer, answer, request to instruct, or in any other manner. They were raised for the first time by motion for a new trial filed after the time allowed for filing such motion. Code, § 2838.

These objections come too late to be entitled to consideration.

The record discloses no error.

**AFFIRMED.**

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BROWN V. ROSE.

1. **Statute of Limitations: ADVERSE POSSESSION.** To entitle the owner of wild lands to the protection of the statute of limitations, his possession thereof must have been visible, actual, notorious, and hostile. It is not enough that he has paid the taxes thereon, and occasionally looked at and shown them to others as his own. His possession must have been such as to indicate a hostile claim thereto.

*Appeal from Madison District Court.*

THURSDAY, APRIL 18.

An action at law to recover land. There was a verdict and judgment for defendant. Plaintiff appeals.

*A. W. C. Weeks and St. John & Williams*, for appellant.

*McCaughan & Dabney*, for appellee.

BECK, J.—I. Among other defenses, the defendant pleaded the bar of the statute of limitations, alleging that plaintiff's

cause of action against him had accrued more than ten years prior to the commencement of the action.

The defendant was permitted to prove, against plaintiff's objection, the general and ordinary acts of ownership exercised by persons owning wild prairie land, which consisted in paying taxes, and, in the language of one witness, "sometimes we traveled over them and looked at, and sometimes we showed them to others." It was shown that defendant, or his grantor, during the ten years preceding the commencement of his action, had exercised these acts of ownership.

The court instructed the jury that to entitle the defendant to the protection of the statute of limitations, he must have 1. STATUTE OF limitations: adverse possession. held the adverse possession of the land under color of title and claim of right for ten years prior to the commencement of the action; that such possession must have been shown to be actual, continuous, notorious, visible, distinct and hostile, and cannot be presumed, but must be strictly proved. The following additional instructions were given upon the same subject:

"10. It is not essential to the existence of actual adverse possession of real estate that it should be surrounded by a fence, or that it should be built upon. But such possession may be inferred from the open, notorious, continuous and exclusive exercise of such acts of ownership, control and dominion with reference to the real estate as are usually exercised by the owners of lands over their lands of like character, and in like situation and condition."

"15. It is not in every act of ownership from which will arise such a cause of action as that the bar of the statute of limitations will begin to run against the owner of real estate. The bar of the statute will begin to run only from the beginning of such open, notorious, distinct, exclusive, adverse and hostile acts of ownership as are commonly exercised by the owners of lands over their lands of the same character, condition and situation."

The admission of the testimony above stated, and the giv-

ing of these instructions, are made the grounds of errors assigned upon the record.

II. The view of the law, as entertained by the court below, appears to be, that the owner of wild lands is to be regarded in the adverse possession when he pays taxes thereon, and extends the attention to them that owners usually exercise towards that kind of property, which, according to the testimony above quoted, is limited to sometimes looking at and showing them to others. This view is clearly erroneous, and does not contemplate the actual, visible and notorious possession required by the law, in order to enable the defendant to plead the statute of limitations. While inclosure of land is not necessary to gain such possession, yet there must be something to indicate the hostile claim of the owner. As is said in a Pennsylvania case, the claimant must keep a flag floating over his property, by exercising the full authority of an owner. This may be done, when land is not inclosed, "by the exercise of such acts of ownership as are necessary to enjoy the ordinary use of which it is capable, and to acquire the profits it yields in its present condition." *Booth & Graham v. Small & Small*, 25 Iowa, 171. There would be no safety in carrying the doctrine farther.

The views of the court below seem to us to dispense altogether with continuous, actual possession, and to plant the right of defendant upon acts which may be done as well by strangers, those who have no claim to the lands, as by the owner.

Language is found in *Langworthy v. Myers et al.*, 4 Iowa, 18, which defendant's counsel rely upon to support the view of the court below. But the question under consideration was not in that case, and whatever is said relates to the possession which will support an action of forcible entry and detainer, and which is inferred from the actual possession of a part of a tract of land.

III. The defendant raises certain questions involving the correctness of the court's ruling upon the admission of testi-

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Morris v. Landaaur & Co.

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mony in support of plaintiff's title to the land. As he did not appeal, he cannot bring these questions before us.

Other questions presented by plaintiff need not be considered, as the judgment of the district court, for the errors above pointed out, must be

REVERSED.

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MORRIS V. LANDAUR & CO.

1. **Trust: ESTABLISHMENT OF.** An envelope was indorsed as containing a "deed from Thomas Morris which is only in trust, and I am to deed back to him any time he desires." A deed between the same parties was introduced in evidence; the fact of a trust having been established, *held*, that in the absence of evidence to the contrary, the deed would be presumed to be the same as that intended by the indorsement.

*Appeal from Cerro Gordo Circuit Court.*

THURSDAY, APRIL 18.

ACTION in equity to set aside a sheriff's sale of land. The land was sold as the property of one Hicks, execution defendant. Landaaur & Co., defendants in this action, were the execution creditors, and purchasers at the sale. They purchased with notice from Hicks that Morris owned the land, and that Hicks never had any interest in it. No deed has yet been executed. The plaintiff avers that he is the owner of the land, and has been from a time prior to the rendition of the judgment. The legal title is in the plaintiff, but he derived it from Hicks, who conveyed to him about the time the judgment was rendered. The judgment, it appears, was rendered upon confession. The conveyance from Hicks to plaintiff was made between the time the judgment was confessed and the time it was confirmed. The plaintiff, however, avers that he was the equitable owner of the land, even while it stood in Hicks' name. Hicks derived title from the plaintiff.

Whether he took the title in trust for the plaintiff is the question in the case. Other facts are stated in the opinion. Decree for plaintiff. Defendants appeal.

*B. F. Hartshorn*, for appellant.

*F. J. Bush*, for appellee.

ADAMS, J.—The plaintiff introduced in evidence a deed of the land in question, executed by him to Hicks, and also an envelope upon which a writing was indorsed, in these words: "Deed from Thomas Morris, which is only in trust, and I am to deed back to him any time he desires." (Signed.) "F. Z.

Hicks." Considerable parol evidence was also introduced, against the defendant's objection, tending to show that the plaintiff conveyed the land to Hicks to protect himself against certain claims that were being prosecuted against him, but which claims, he insisted at the time, were groundless, and which were, in fact, groundless, as was afterward determined by adjudication thereon; that Hicks paid nothing for the land, and never took possession; that the plaintiff, at the time the deed was executed to Hicks, was occupying the land as a farm, and continued to occupy it. It is insisted by the defendants that the trust cannot be established by parol, and that the writing indorsed upon the envelope is insufficient.

Whether, as the trust has been executed by reconveyance, parol evidence is not admissible as against the defendants, who were not parties to the agreement by which the trust was created, we need not determine. The writing upon the envelope was evidently made as a declaration of trust, to be used as evidence, if necessary. It showed that some deed had been executed to Hicks by the plaintiff, in trust. A deed executed to Hicks by the plaintiff is introduced in evidence. We think the fair inference is that the deed is the same referred to in the writing, in the absence of all evidence indicating other-



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Tuttle v. The C., R. I. & P. R. Co.

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wise. The fact of a trust is established beyond controversy. The only question of doubt is in regard to the identity of the property. The deed introduced corresponded with the writing. We cannot hold, then, that there was no evidence of identification, and it follows that a *prima facie* case was made for the plaintiff. But it is insisted by the defendants that the conveyance, if made in trust, was made to defraud creditors, and that the relief sought should be denied him upon that ground, if upon no other. We think that this position, also, is not well taken. It does not appear that the plaintiff was indebted or subject to any contingent liability. If there were no creditors, we cannot say that the conveyance was made to defraud creditors. We think, therefore, that the judgment of the circuit court must be

- AFFIRMED.

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TUTTLE V. THE C., R. I. & P. R. Co.

1. **Negligence: PRESUMPTION OF: CARE REQUIRED.** Proof of the occurrence of an accident which, under ordinary circumstances, would not have happened if due care had been exercised, raises a presumption of negligence, and to rebut this presumption the defendant must show that in the selection and operation of the machinery which caused, or contributed to, the accident, he used due care, skill, and prudence, but he is not required to furnish a satisfactory explanation of the cause of the accident to relieve himself from liability.

*Appeal from Polk District Court.*

THURSDAY, APRIL 18.

THE plaintiff claims of defendant the sum of five thousand dollars, on account of injuries sustained on defendant's road. About the last of October, 1872, the plaintiff was a passenger on the defendant's train, consisting of four coaches. Just after the train left Peru Station, in Illinois, the two rear cars

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Tuttle v. The C., R. I. & P. R. Co.

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separated from the balance of the train, which ran ahead a distance of some thirty feet from the detached cars, and was stopped. The rear cars approached and came in contact with the front portion of the train, with such violence, it is claimed, as to severely injure the plaintiff. There was a jury trial, resulting in a verdict for plaintiff for two thousand five hundred dollars. The defendant appeals.

*Wright, Gatch & Wright*, for appellant.

*Phillips, Goode & Phillips*, for appellee.

DAY, J.—The defendant filed an amendment to the answer, alleging that, at the date of the alleged accident, and at the time of the commencement of this suit, the plaintiff was, and still is, a married woman, and that she ought not to maintain this action in her own name. The plaintiff demurred to this amendment. The demurrer was sustained. From this ruling, and others, the defendant appealed. This court held that this ruling was proper, but reversed the cause on other grounds, and remanded it for a new trial. See 42 Iowa, 518. The cause having been retried, appellant insists now upon the same objection, and urges, with much earnestness and ability, that this court was in error in holding, upon the former appeal, that a wife may sue alone for a tort committed against her. We do not understand that this question is now properly before us for consideration. The question of the right of the plaintiff to maintain this action, without uniting her husband with her, was settled upon the former appeal. That question was not presented to, or passed upon by, the court below upon the second trial. As no action was taken by the court below on this question, in the trial from which this appeal is prosecuted, there has been no ruling upon this question which we can review.

II. The cause was reversed on the former appeal, for the reason that plaintiff was allowed to recover on account of

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Tuttle v. The C., R. I. & P. R. Co.

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loss of time, and expenses incurred and paid by her husband. Upon the retrial the defendant asked the court to instruct the jury as follows:

"12. Plaintiff cannot recover in this action for loss of time, loss of service, nor for any money paid to physicians by the husband in and about her claimed illness and injury.

"13. In this case the jury have nothing to do, in estimating damages, with any question of loss or injury to the husband, and hence they will not consider his loss of the society of the wife, nor the loss of her services, nor any expenses, inconvenience or loss to which he may have been put or exposed.

"14. That the husband would be liable for physicians' bills, and not the wife, and hence, for any such liability, if such bills are unpaid, she could not recover in this action."

These instructions contain the law as announced on the former appeal. Appellant, however, concedes that plaintiff, in the court below, made no claim of right to recover for expenses or loss of time. The abstract does not show that any evidence was introduced bearing upon these questions. The court instructed the jury that the measure of plaintiff's damage "will be such an amount as, under all the facts and circumstances of the case, as shown by the testimony, you may believe will fully and fairly compensate or pay her for all bodily pain and suffering, if any, endured or to be endured by her, and produced by the injury, and for all mental anguish, if any, suffered and to be suffered by her, and caused by the injury, as well as all other losses which she has sustained, or will hereafter sustain, as a direct, certain and proximate consequence or result of the injury received by her." This instruction undertakes to state the measure of plaintiff's damage. Whatever is not included in this instruction is, by implication, excluded from consideration. This instruction limits the recovery to matters personal to the wife. It negatives the idea that anything can be recovered on account of any loss sustained by the husband. When we consider, in addition to this, the fact that no proof was introduced of any

loss of time by the wife, nor expense incurred on account of the injury, we think it becomes apparent that no substantial prejudice could have resulted from the refusal of the instructions asked.

III. The defendant introduced testimony that there was in use upon this train the Miller coupling, regarded by railroad

1. NEGLIGENCE: men generally as the best in use; that these coup-  
presumption: presumption:  
care required. lers are not liable to uncouple; that the coupler in  
question had not been used more than a year, and was examined about fifteen miles from where the accident occurred, and found in good condition; that after the separation it was again examined, and nothing discovered to be out of order; that the wedge which holds the bars was properly in place; that the cars coupled themselves when they came in contact, and proceeded to Chicago without further trouble. No witness undertook to account for the uncoupling of the train. The court instructed the jury as follows: "While the burden of proof is upon the plaintiff to show the negligence of defendant, yet, if you find from the evidence that an unusual, extraordinary and dangerous accident occurred, to the injury of plaintiff, which would not have taken place, under ordinary circumstances, had the defendant and its employes at the time been exercising due care, prudence, skill and watchfulness; and if you further find that the cause of the accident was and is unknown to plaintiff, then it devolves upon defendant to satisfactorily explain the accident, and, in the absence of such explanation, negligence will be presumed against it."

We think this instruction was calculated to mislead the jury to the defendant's prejudice. It is true that where a dangerous accident occurs, which, under ordinary circumstances, would not have happened had the defendant and its employes exercised due care, prudence and watchfulness, proof of such an accident, with its attendant circumstances, raises a presumption of negligence, and the burden of proof is then cast upon the defendant to rebut this presumption. To this end defendant must show that in the selection and operation

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Tuttle v. The C., R. I. & P. R. Co.

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of the machinery which caused, or contributed to, the accident, it used due care, prudence, skill and watchfulness. This is as far as, upon any well recognized legal principle, the burden of proof can be cast upon the defendant, and is as far as any adjudication, to which we have been referred, has gone. Appellee relies upon *Oarpue v. London Ry. Co.*, 48 English Common Law Reports, 747. In this case Lord Denman charged the jury at *nisi prius* that they must be satisfied that the accident had been brought about by the negligence of the defendants in the course of carrying the plaintiff upon the railway, and that it having been shown that the exclusive management, both of the machinery and the railway, was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced; which explanation the plaintiff, not having the same means of knowledge, could not reasonably be expected to give. In the Court of Queen's Bench the case was decided solely upon the question whether the defendants were entitled to notice under the act for their incorporation. No reference whatever was made to this charge. The language employed in it cannot be regarded as authority for the doctrine contended for.

In this case, upon proof that the train uncoupled, a presumption may arise that there was negligence, either in the selection of the coupler or in the management of it, for it may be presumed that a coupler of approved pattern, properly managed, would not uncouple. Hence, proof of the fact of uncoupling may cast upon the defendant the burden of proving that the coupler was of a proper kind, and was carefully managed. If the instruction had not gone farther than this it would not have been objectionable. But the court instructed the jury that, upon proof of such an occurrence, it devolved upon the defendant, not to prove that it exercised due care in the selection and operation of the coupler, but to satisfactorily explain the accident, and that, in the absence of such explanation, negligence will be presumed. In other words, when

## Collins v. Chantland.

such an accident is proved to have occurred, the defendant can relieve itself from liability for the accident only by furnishing a satisfactory explanation of it. Many accidents occur which are not susceptible of satisfactory explanation. An iron bridge which has, without apparent injury, sustained a heavy freight train, suddenly gives way under a much lighter passenger train. A train may pass over a road in safety one day, and the next, without any apparent cause, may be precipitated into the ditch. A car wheel of approved manufacture, and without any apparent flaw, suddenly breaks down. An old revolver, that has been knocked around for half a dozen years, and been snapped a hundred times, finally goes off and occasions death. These things are all inexplicable. And yet, under the doctrine announced in this instruction, a railroad company, which could not satisfactorily explain why a bridge broke down, or a train jumped the track, at a particular time, would lie under the imputation of negligence, notwithstanding it might show the exercise of the highest degree of care in the construction of the road, the bridge, and the operation of the train. The law, properly construed and administered, does not impose any such unreasonable condition.

REVERSED.

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 COLLINS ET AL. V. CHANTLAND ET AL.

48	241
104	436
48	241
142	211

1. **Homestead: ACTION TO CHARGE WITH LIEN: HOMESTEAD RIGHT MUST BE ASSERTED.** One who, through ignorance of his homestead rights, neglects to assert them in defense of an action to charge the property with a lien, cannot afterwards maintain an action to prevent the enforcement of the lien.
2. ———: ———: **INTEREST OF MINOR IN.** A minor has not such an interest in the homestead of his parents as will defeat the enforcement against it of a lien which is valid against the parents.

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*Appeal from Webster Circuit Court.*

THURSDAY, APRIL 18.

IN chancery. A demurrer to the petition was sustained. Plaintiffs appeal. The facts of the case appear in the opinion.

*J. F. Duncombe and A. N. Botsford*, for appellants.

*O'Connell & Springer*, for appellees.

BECK, J.—I. The petition alleges that Alice McNamara instituted an action against Peter Maloney for injuries sustained by reason of sales of intoxicating liquors to her husband ; that Collins was made a party to the action, and a lien was claimed against his real estate occupied by Maloney, where the liquors were sold. A verdict and judgment were rendered against Maloney, and the jury found that Collins' property was occupied and used for the sale of the liquors with his consent. The judgment was declared to be a lien upon the property, and a proper judgment enforcing it was entered. A special execution was issued upon the judgment, and the property is about to be sold thereon.

1. HOMESTEAD: action to charge with lien: homestead right must be asserted.

The petition alleges that the property was occupied by plaintiff and his family as a homestead ; that, being ignorant of his rights, he did not set up the homestead character of the property as a defense against the action, and that Alice and Joseph, his minor children, who unite with him as plaintiffs, are interested in the action, the property involved therein being their home. The petition further charges that the order declaring the judgment a lien on plaintiffs' property was entered by the clerk after adjournment of the term, without direction or authority of the court.

A demurrer to the petition was sustained. This ruling presents the question demanding our attention in this case.

II. It may be conceded, for the purposes of this case, that the property was occupied as a homestead, and that the provision of Code, § 1558, exempting homesteads in cases of this kind, is applicable to property leased for the sale of intoxicating liquors. This point we do not decide, but, as will be seen, dispose of the case on other grounds.

III. The plaintiff Collins was a party to the action wherein judgment was rendered against his property. Any defense which he had to the claim for a lien made against him should have been made in that action. Failing to make such defense, he cannot resist the enforcement of the judgment upon the ground that the property is exempt from the lien. The question of the lien is *res adjudicata*. His ignorance of his rights at the time the judgment was rendered is no ground for setting it aside. These positions rest upon elementary principles that need not be stated here.

IV. It is insisted that the minor children of Collins, who  
 2 —: —: are parties to this suit, have rights in this home-  
interest of  
minor in.stead, and that, as they were not parties to the  
 original action, their rights may be protected in this action.

It is true that the children have an interest in the homestead, but it is not an interest that the law will enforce against the parent, or that is held free of the parent's contract or act intended to affect it. The parents may mortgage the homestead: the children cannot be heard to object to the foreclosure of the lien; the parents may alienate or abandon the property as a homestead: the children have no rights which can be interposed to defeat such disposition of the property. They have none which will defeat the lien in this case. Smyth's Homestead Exemption, § 72.

V. It is lastly urged that the judgment was rendered after the adjournment of the term, and without the direction or authority of the court. The judgment is not shown to be contrary to the pleadings and verdict. Its entry was a matter of



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Emmet County v. Skinner.

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course, and, under proper circumstances, could have been made after the term. It is certainly not void. If irregular, or irregularly entered, it should be corrected upon motion, which is an open way to an adequate remedy, if any wrong has been done in the matter.

No other questions arise in the case. The judgment of the Circuit Court is

AFFIRMED.

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EMMET COUNTY V. SKINNER ET AL.

1. **School Fund: BOARD OF SUPERVISORS.** The board of supervisors may make such reasonable rules for the loaning of the school fund as to them shall seem proper, and, among others, may provide that the fund shall only be loaned to residents of the county.
2. ———: **FORECLOSURE.** In an action by the county to foreclose a school fund mortgage, the fact that the defendant, who was the grantee of the mortgagor, had paid the interest and made application to the auditor for a loan equal to the amount of the mortgage, was *held* to constitute no defense to the action.

*Appeal from Emmet District Court.*

THURSDAY, APRIL 18.

THE plaintiff asks judgment against the defendants Skinner, Jenkins and Ridley for the amount of a promissory note, and prays the foreclosure of a mortgage executed to secure the same, and asks that the estate and interest of the defendant G. L. Henderson in and to the mortgaged premises be declared junior and inferior to plaintiff's mortgage. The defendant Henderson answered, alleging that he is the absolute owner of the mortgaged premises; that he purchased the same from the mortgagor, and assumed and agreed to pay the mortgage as part of the consideration therefor; that prior to the commencement of this action he paid up all the interest

## Emmet County v. Skinner.

on said mortgage, and made application to the county auditor for permission to borrow the same, and offered to provide the requisite amount of securities, and comply in all respects with the requirements of the law relating to new loans, and that such application was refused, on the ground that said defendant was not a resident of Emmet county, and the board of supervisors of said county had directed the auditor to loan said school fund to residents of said county. Said defendant renewed the application and offer in the answer, and asked that plaintiff's petition be dismissed, and the action abated.

The plaintiff demurred to this answer. The demurrer was sustained. Defendant Henderson appeals.

*E. B. Soper*, for appellant.

*H. G. Day* and *T. W. Harrison*, for appellees.

DAY, J.—I. The defendant bases his claim upon section 1871 of the Code, which is as follows: "Any person responsible to the school fund for any part of the principal thereof, who shall promptly pay all interests and costs, if any, thereon, whether the same may be rendered into a judgment or not, shall be permitted to borrow such principal upon complying, in all respects, with the requirements of law relating to new loans." This section should be construed in connection with other provisions of the law on the subject of the school fund.

1. school fund:  
board of su-  
pervisors.

Section 1860 provides that the several boards of supervisors shall hold and manage the securities given to the school fund in their respective counties, and such counties shall be severally liable for all losses upon loans of such fund made in such county. Section 1881 provides that on and after the 1st day of January, 1874, the boards of supervisors of the several counties shall have sole control and management of all loans on mortgages then held or thereafter made, and shall, when necessary, have them foreclosed at the expense of the county, and any losses sustained, or gains realized upon foreclosures

and re-sales of mortgaged property, shall be made good by, or inure to the benefit of, the county, as the case may be. The board of supervisors being thus intrusted with the management of the school fund, may, we think, make such reasonable rules for the loaning of it as will, in their judgment, prevent loss to the fund, and consequent liability on the part of the county. We think it is a reasonable and proper regulation that the money should be loaned to a resident of the county in which the loan is made. If the board cannot establish such rule, then, under section 1871 of the Code, a party might be entitled to a renewal of his loan, although he had become a non-resident of the State. It is apparent that the interests of the fund might be greatly prejudiced by allowing it to pass into the hands of non-residents of the State. As the defendant does not come within the class to whom the board of supervisors authorized loans to be made, he is not entitled to a loan under section 1871.

II. There is another view of this case which is decisive of it. If the defendant was entitled to a loan, and it was refused him, that fact constitutes no defense to this action, nor reason why the suit should abate. If the law enjoins upon the auditor the duty of accepting the security and making the loan, the performance of that duty may be compelled by *mandamus*.

**AFFIRMED.**

## CRAWFORD V. WILLIAMS.

48	247
136	30

1. **Damages: STOCK BREEDING: EVIDENCE.** In an action for damages by the owner of a thoroughbred cow against the owner of an unpedigreed bull which, being allowed to run at large, had got plaintiff's cow with calf, it was *held*, that a herd-book was not admissible without proof that it was recognized by breeders, and that plaintiff's cow was the one registered therein under the same name.
2. ———: **MEASURE OF.** The measure of damages in such a case is the difference in value of plaintiff's cow for breeding purposes before and after meeting defendant's bull.

*Appeal from Johnson District Court.*

THURSDAY, APRIL 18.

THE plaintiff alleges that on the 9th day of April, 1875, he was a breeder of reputed fine thoroughbred stock of the kind known as short-horns, and that, on said day, an ill-bred, unregistered and unpedigreed bull, belonging to defendant, unlawfully at large in the highway, served and got with calf plaintiff's two year old heifer, called "Royal Butterfly," which is reputed to be registered in American Herd Book, vol. 13, p. 926, to the damage of plaintiff in the sum of five hundred dollars.

The defendant, for answer, denies all the allegations of the petition. The bill of exceptions shows the following proceedings: The plaintiff testified as follows: "I reside in Fremont township, Johnson county. Am a breeder of 'short-horn' fine stock; have been for seven years. Defendant lives only a mile and a few rods from me; our land corners. On April 9, 1875, I was on my way home from Chicago. I landed at West Liberty. I had seven head of short-horn stock (thoroughbreds) that I purchased at Waukegan, Illinois. I purchased them as thoroughbreds from C. C. Park's herd, known as the *Glen Flora Herd*. I landed at West Liberty at 5 o'clock P. M., and after feeding them started for home, driving

them. About sixty rods from my own gate I met some cattle lying on the road. I supposed they were just cows, till I got among them, and the first thing that I knew there was a bull served one of my heifers. The animal served is called the "Royal Butterfly." The bull is not a pedigreed animal. The Royal Butterfly is. She is registered in the American Herd Book. I know she was registered because I saw it. I did not register her. I did not see her registered. I did not raise the animal. I only know about that what somebody else told me. I know it is the same animal by the Herd Book." The defendant then objected to all testimony of the witness in regard to the registry of the animal, as incompetent, being hearsay. The objection was sustained, and plaintiff excepted. Plaintiff offered in evidence vol. 13 of the American Herd Book. The defendant objected to it as incompetent and not the best evidence. The objection was sustained, and plaintiff excepted. Plaintiff then proposed to show that the defendant's bull got his cow with calf, and that the cow is registered as alleged, for the purpose of affecting the measure of damages. The defendant's objection was sustained, and plaintiff excepted. Plaintiff then proposed to show, as a measure of damages, the difference in value between a calf begotten by defendant's bull, and one she would have had if bred as he proposed to breed her to a thoroughbred bull, Cherry Duke 4th, No. 16,467, p. 98, American Herd Book; that he bought her with a view of breeding to that bull, and to show that he was a good calf getter, etc. To this proposed evidence the defendant objected. The objection was sustained, and plaintiff excepted. The court, thereupon, ruled that the measure of damages in this case is the physical injuries or damages that might have been done to the cow herself, by reason of the attack made upon her by the bull, and confined to that particular time. The plaintiff excepted to such rulings, as not being the proper rule for estimating the damages in the action, and announced that he expected to prove no physical injury to his said animal, and under such restricted rulings he could not pro-

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 Crawford v. Williams.
 

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ceed with his case, as it excluded all the proper elements of damages to him as a breeder of pedigreed short-horns. Thereupon the court instructed the jury that the plaintiff had offered no evidence of damages, and it was their duty to find for defendant, which they did. The plaintiff filed a motion to set aside the verdict and for a new trial, which was overruled. Judgment was rendered against plaintiff for costs. Plaintiff appeals.

*Robinson & Patterson*, for appellant.

*Boal & Jackson*, for appellee.

DAY, J.—I. There was no error in excluding the Herd Book. Without some proof that its correctness was recognized by cattle breeders, and that the plaintiff's  
 1. DAMAGES: stock breed-  
 ing: evidence. heifer was the identical Royal Butterfly entered in this book, the book was clearly inadmissible.

II. The court erred in the rule of damages announced. Bulls are prohibited from running at large, and the owner is  
 2. \_\_\_\_: meas-  
 ure of. 1447, 1450. This damage cannot properly be restricted to the merely physical injuries which they occasion. The importance to the State of improvement in all kinds of stock can scarcely be overestimated. The intelligent public spirit which employs itself in the improvement of stock ought to be encouraged and protected. It will be found impossible to maintain good breeds of stock if the owners of "scrub" male animals may permit them to run at large with impunity. Much skill and intelligence are requisite upon the part of stock breeders in selecting the most desirable crosses, so as to transmit the best qualities to the progeny. Each stock breeder has the right to make this selection for himself. If he is deprived of the right of making this selection he ought to be fully compensated for the injury inflicted. The value of thoroughbred stock consists in the probability that the

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Sexton v. Peck.

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qualities of excellence will be transmitted to the offspring. It is evident that, to a breeder of fine stock, a thoroughbred heifer, with calf to a bull of impure blood, would be of less value than one with calf to a thoroughbred, or not with calf at all. The difference in value of the heifer, for the purpose of breeding fine stock, before meeting defendant's bull and afterward, constitutes the proper measure of plaintiff's damages.

REVERSED.

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SEXTON V. PECK.

1. **Tax Sale: STATUTE OF LIMITATIONS: RECOVERY OF TAXES.** An action by a tax purchaser for the recovery of the taxes paid by him upon land, the title to which has been quieted in the patent owner, is barred in five years after the taxes become delinquent.

*Appeal from Warren Circuit Court.*

FRIDAY, APRIL 19.

THE plaintiff purchased certain real estate at tax sale on the 5th day of October, 1863, and on the 2d day of January, 1867, obtained his tax deed, and filed the same for record.

On the 9th day of July, 1874, the defendant, who was the owner of the patent title of the land, commenced an action against the plaintiff to quiet his title, alleging that he had held adverse possession for more than five years after said tax deed was recorded. The result of said action was, that defendant obtained a decree quieting his title.

The land was sold for taxes for the years 1861-2, which plaintiff paid at the time of the sale. This action was brought on the 24th day of February, 1876, to recover the taxes paid by plaintiff, including penalty and interest, and for a decree making the same a lien upon the land.

The defendant pleaded the statute of limitations, more than

## Sexton v. Peck.

five years having elapsed after the cause of action accrued, and the payment of the taxes for the said years, as alleged in the petition.

There was a trial by the court, and a decree dismissing the petition at plaintiff's cost. Plaintiff appeals.

*Bryan & SeEVERS*, for appellant.

*HENDERSON & BERRY*, for appellee.

ROTHBROOK, CH. J.—It is conceded that the tax sale and deed were in all respects regular, and that the defendant's title to the land was quieted upon the ground that he had held the adverse possession for more than five years after the plaintiff's tax deed was filed for record. The only question now presented is, whether the plaintiff's claim for taxes paid by him is barred by the statute of limitations.

It was held in *Brown & Sully v. Painter*, 44 Iowa, 368, that an action for the recovery of taxes, paid by a tax sale purchaser more than five years prior to the commencement of the action, was barred by the statute of limitations. It is insisted, in the case at bar, that the statute of limitations did not commence to run until it was adjudged that plaintiff was not the owner of the land. In this view we cannot concur.

In *Everett v. Beebe*, 37 Iowa, 452, and other cases, it was held that the holder of a voidable tax deed is entitled to recover of the owner of the land the amount which he would have to pay to the treasurer in order to satisfy all the taxes, if they had not been paid by the tax sale purchaser. The reason of the rule is, that by statute the purchaser holds the interest and claim of the State and county in the land. This interest and claim is the taxes due. The tax sale purchaser is subrogated to the rights of the county and State.

If an action should be brought by the county for the recovery of taxes, it would be barred in five years after the taxes



## Knox v. Hanlon.

became delinquent. "The county is liable to the State for delinquencies in the taxes, and suits pertaining thereto must be prosecuted by the county, or for the benefit of the county." *Brown & Sully v. Painter, supra*, and see *City of Burlington v. B. & M. R. R. Co.*, 41 Iowa, 134.

The plaintiff, therefore, being entitled to recover for taxes paid, because he holds the right and claim of the county and State, his rights must be determined by the same rule as though the action had been brought by the county. See *Callanan v. The County of Madison*, 45 Iowa, 561.

**AFFIRMED.**

## KNOX V. HANLON.

48	252
81	439
48	252
105	394

1. Practice: FINDING OF COURT. The finding of a court stands as the verdict of a jury, and will not be disturbed unless clearly unsupported by the testimony.
2. Homestead: HUSBAND AND WIFE: EXEMPTION. Where, upon the death of the husband, the homestead is set apart to the wife as her distributive share of the estate in fee simple, it is exempt from debts contracted prior to that time.
3. ———: FUNERAL EXPENSES. Bills incurred in the last sickness, and funeral expenses, do not constitute charges upon the homestead.

*Appeal from Polk Circuit Court.*

FRIDAY, APRIL 19.

THE plaintiff, the grandson of Catherine Hanlon, claims that by inheritance from Catherine Hanlon, and purchase from another of her heirs, he is the owner of an undivided four twenty-first parts of a certain forty acres of land of which the said Catherine Hanlon died seized. The plaintiff makes the other heirs of Catherine Hanlon parties defendant, and asks partition of the real estate described. The defendant, A. F. Hanlon, alone answered. He admits that Catherine Hanlon

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Knox v. Hanlon.

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died seized of the real estate in question, and that she left the persons named in the petition as her heirs. He alleges that the estate of Catherine Hanlon is indebted to a larger amount than the property belonging to the estate is worth, said indebtedness being the charges and expense of the last sickness and funeral of said Catherine Hanlon, and that the said debts will more than exhaust the whole of said real estate, so that when they are paid there will be nothing left to divide. He asks that plaintiff's petition be dismissed. The plaintiff replied, admitting that the estate of Catherine Hanlon, deceased, is indebted to a larger amount than the property belonging to said estate, including the real estate described in the petition, is worth, and that said debts will more than exhaust the whole of said real estate, but alleging that the real estate described in the petition was, at the time of the death of Catherine Hanlon, and for a long time prior thereto had been, and was at the time said debts were contracted, her homestead, and that said real estate is not liable for said debts, but becomes the property of plaintiff and defendants in the manner and proportion as set forth in plaintiff's petition. The court granted partition of the property as prayed. The defendant, A. F. Hanlon, appeals.

*Maxwell, Lee & Witter*, for appellant.

*McHenry & Bowen*, for appellee.

DAY, J.—In October, 1873, John Hanlon died seized of one hundred and sixty acres of land, forty acres of which, the land which is the subject of this controversy, the said John Hanlon, for a long time prior to his death, with his wife, Catherine Hanlon, had occupied as a homestead. Catherine Hanlon, for about two years after her husband's death, continued to occupy the old homestead, with one of her granddaughters. Being very aged and helpless, and requiring much care and attention, she then went to live with her son, A. F. Hanlon, appellant. She took part of her household furniture, and left

part at the old home. In about two months A. F. Hanlon sold his farm, and rented the old home farm of his mother and the heirs. He moved upon this with his mother, in October, 1875. In September, 1875, the widow and heirs of John Hanlon petitioned for partition of the one hundred and sixty acres of land of which he died seized. On the 27th of November, 1875, the court set apart to Catherine Hanlon, as her distributive share, in fee simple, the forty acres in controversy, being the same occupied as a homestead by John Hanlon before his death. The defendant, A. F. Hanlon, has an account against Catherine Hanlon's estate for taking care of her, for medicines, doctors' bills, funeral expenses, etc., amounting in all to two thousand and forty-two dollars and sixty-seven cents. Payments have been made on this account reducing it to eight hundred and fifty-eight dollars and sixty-seven cents. This amount has been allowed by the administrator of Catherine Hanlon's estate, and the defendant claims he is entitled to have it paid out of the property of which partition is sought.

I. At the death of John Hanlon, the homestead which he occupied at the time of his death became the homestead of Catherine Hanlon, his widow. Code, §§ 1989 and 2007. Section 2008 provides that if there be no survivor the homestead descends to the issue of either husband or wife, according to the rules of descent, unless otherwise directed by will, and is to be held by such issue exempt from any antecedent debts of their parents or their own. It is claimed that Catherine Hanlon abandoned her homestead when she went to live with the defendant, her son, and thus rendered it liable for his debts. In finding the homestead not thus liable, and decreeing partition, the court must have found that there was no abandonment of the homestead. No motion was made for a trial of the cause upon written evidence, as provided in section 2742 of the Code. The case is not, therefore, as we have repeatedly held, triable *de novo* in this court. The finding of the court below, upon a question of fact, stands

1. PRACTICE:  
finding of  
court.

## Knox v. Hanlon.

as the verdict of a jury, and is not to be disturbed, unless clearly unsupported by the testimony. The finding is not so without support in the evidence as to warrant our setting it aside.

II. It is further claimed that, when Catherine Hanlon procured her distributive share in her husband's estate to be assigned to her in fee, she thereby waived her prior homestead rights; that the defendant's claim arose before the time, and that the property in question became liable for it. The property in question was set off to Catherine Hanlon, in fee, on the 27th day of November, 1875. It appears affirmatively that most of defendant's claim arose since that time, and does not affirmatively appear that any of it arose before. As the defendant is asserting the liability of this property for his claim, if that liability depends upon the fact that the debt to him was contracted before this property was set apart to the widow in fee, the burden of proof is upon him to establish this fact.

III. But even if it should be conceded that the whole of the debt to defendant was contracted prior to the setting apart of this property to Catherine Hanlon, as her distributive share, it did not, upon being so set apart, become liable for this debt. The property in question was the homestead of Catherine Hanlon and her husband. Upon the death of her husband the homestead became hers. The same property that constituted the homestead was afterward set apart to her as her distributive share, in fee simple. In *Briggs v. Briggs*, 45 Iowa, 318, we held that where a wife had her distributive share in her husband's estate assigned to her in fee, including a part of the homestead, it did not become liable for a judgment existing against her at the time. That case is decisive of this question.

IV. It is claimed that the homestead of Catherine Hanlon is not exempt from liability for the charges and expenses of her last sickness and of her funeral. It is claimed that

2. HOMESTEAD:  
husband and  
wife: exemp-  
tion.

Duffees v. Judd.

3. ——— :  
 funeral  
 expenses.

these do not constitute debts, in the ordinary acceptation of the term, but that they are charges entitled to preference, and may be discharged out of the homestead. In support of this view, appellant refers to sections 2418 and 2420 of the Code. We think there is no warrant in the law for this construction. The general policy of the law is to exempt the homestead. Exemption is the rule; liability the exception. Where the owners of the homestead have not themselves voluntarily encumbered it, the only provision of the law for the sale of the homestead on execution is for debts contracted prior to the purchase of the homestead. The exemption of the homestead in this case may apparently work a hardship. But the rules of law must be general, and applicable alike to all cases. If the children of Catherine Hanlon, instead of being adults, and capable of caring for themselves, were of very tender years, dependent upon this property for shelter and maintenance, the humanity of declaring it exempt from the claim now made would be very apparent, and the equity very controlling. The judgment is

**AFFIRMED.**

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**DUFFEES V. JUDD.**

1. **Stock: DAMAGE BY: PARTITION FENCE.** The fact that stock is prohibited from running at large in a county does not relieve the land owner from the duty of maintaining partition fences, and if he suffer damage resulting from his neglect of his fences, he cannot recover therefor from the owner of the stock causing the damage.
2. ——— : **APPEAL: JURISDICTION.** Upon an appeal from an assessment of damages by the township trustees, not only the amount of damages awarded by the trustees, but also the question as to whether the claimant is entitled to damages at all, may be considered.
3. **Evidence: ORDER OF INTRODUCTION: TRIAL.** The order of introduction of testimony rests largely within the discretion of the trial court, and appellant must show that he suffered prejudice by the exercise of that discretion before he can claim relief.

48	256
144	658

*Appeal from Poweshiek Circuit Court.*

FRIDAY, APRIL 19.

On the 5th day of December, 1874, there was filed in the office of the township clerk of Pleasant township, Poweshiek county, by the township trustees, their assessments of the damages sustained by the plaintiff by the trespassing of defendant's cattle, as follows:

"We, the undersigned, trustees of Pleasant township, in Poweshiek county, State of Iowa, having been called on this day by Alexander Duffees to appraise the damage done to him by about one hundred and fifteen head of cattle which he had distrained for damages done to him, do hereby certify that we have this day visited the damaged premises, and report that said Duffees has sustained damages from the trespassing of said cattle in the sum of seventy dollars. We further fix the amount of pay to which said Duffees is entitled per day for keeping said stock, from the time of distraining till the day of sale, at seven dollars per day. We have also fixed the day when said stock, or so much thereof as shall be necessary to pay the damages and costs of keeping, shall be sold, as Tuesday, the 15th day of December, A. D. 1874, at 2 o'clock p. m., at the yard of Alexander Duffees, where said cattle are distrained; and we have this day posted up notices of said sale in three conspicuous and public places in said township of Pleasant. Witness our hands this 5th day of December, 1874."

On the 7th day of December, 1874, the defendant filed in the office of the township clerk of said township his appeal bond in the sum of two hundred dollars, and on the same day he gave notice of appeal from the assessment of damages. The cause came on for trial in the Circuit Court before a jury, and a verdict was returned for the defendant.

The plaintiff appeals.

*Clark Varnum*, for appellant.

*Wm. R. Akers* and *Wm. R. Lewis*, for appellee.

DAY, J.—I. The bill of exceptions shows the following facts: “The plaintiff offered testimony tending to show that 1. stock: damage by: partition fence. under chapter 70 of the Acts of the Fifteenth General Assembly, and chapter 3, of title 11, of the Code of 1873, the question of restraining stock from running at large between sunset and sunrise had been adopted in Poweshiek county by a vote of the electors of said county, at the general election of 1874, and for that purpose offered in evidence the journal of the board of supervisors of Poweshiek county, one of the record books of the county, to the introduction of which the defendant objected, for the reason that there was no claim or evidence tending to show that the cattle were running at large, but the evidence was that the cattle broke into the plaintiff’s inclosure from an adjoining inclosure, and through the division fence separating plaintiff and said adjoining inclosure, and because immaterial; and which objection was sustained by the court, and the journal of the board of supervisors and records excluded, to which ruling of the court the plaintiff at the time excepted.” The plaintiff assigns this action of the court as erroneous. As we have not the evidence before us, we must presume, in favor of the ruling of the court, that the objection which defendant made to the introduction of this testimony did in fact exist, and that there was no evidence tending to show that the cattle were running at large, but that, upon the contrary, the evidence showed that the cattle broke into plaintiff’s inclosure from an adjoining inclosure, through the division fence separating plaintiff and said adjoining inclosure. The position of appellant seems to be, that cattle are running at large whenever they pass from the inclosure of the owner upon an adjoining inclosure, although they may pass through the portion of a partition fence which belonged to an adjoining owner, and

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Duffees v. Judd.

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which he had neglected to maintain in repair; and that, if the county has adopted provisions prohibiting stock from running at large, the owner of stock escaping into an adjoining inclosure, in the manner above indicated, is liable for all damage occasioned. In other words, the position of appellant is, that where stock is prohibited from running at large, there can no longer be any duty to maintain partition fences, and that every owner, at his peril, must see to it that his stock is kept upon his own premises. We are satisfied that this position of appellant is not correct. Where lands are in fact inclosed, the duty of maintaining partition fences between them is the same in counties where stock is prohibited from running at large, as in counties where no such prohibition exists. Section 1508 of the Code provides, "that all the provisions of this chapter in relation to partition fences shall be alike applicable to counties or townships having restrained, or which may restrain, stock from running at large." The wisdom of this provision is very apparent. Suppose a party, in a county where stock is prohibited from running at large, for the purpose of pasturage, incloses forty acres of land in connection with an adjoining forty owned by his neighbor, and used for agricultural purposes. He has the same right to use his forty for a pasture that his neighbor has to use his for raising corn, and it is but equitable that his neighbor shall build half the division fence. If, then, such partition fence has been built, and the stock lawfully upon one inclosure escapes upon the other inclosure, and does damage, because of the neglect of the injured party to maintain his portion of the partition fence, is the owner of the stock liable therefor? Section 1448 of the Code determines this question. It provides: "When any person is injured in his lands by any kind of domestic animal, he may recover his damages by an action against the owner, or by distraining the animals doing the damage; but, if they were lawfully upon the adjoining land, and escaped therefrom in consequence of the neglect of the person suffering the damage to maintain his part of the division fence,



the owner of the animals shall not be liable for such damage." It does not appear that in the rejection of the evidence there was any error.

II. On the trial of the cause the defendant offered evidence tending to show that the cattle distrained were lawfully upon the adjoining inclosure, and that they escaped from such inclosure of plaintiff through a fence which was not a lawful fence. The plaintiff objected to this testimony for the following reasons: "1. That the only question for the jury to determine in the appeal from the assessment of damages by the township trustees is the amount of damages sustained. 2. Because it was conceded, and not contradicted in the testimony, that the cattle had trespassed on plaintiff's lands, and done damage thereon, between sunset and sunrise, and because plaintiff was not bound to maintain a partition fence against stock trespassing in the nighttime, under chapter 70 of the Acts of the Fifteenth General Assembly, and chapter 3 of title 11 of the Code of 1873." The court overruled these objections, and admitted the testimony. The bill of exceptions recites that there was no evidence that the cattle had broken into plaintiff's inclosure through an outside fence.

1. Appellant insists that, upon an appeal from an assessment of damages by the township trustees, it must be admitted that the conditions exist which entitle the plaintiff to some damages, and that the only question to be reviewed is the amount of damages allowed. In other words, that upon such appeal it cannot be shown that the damage was all occasioned because of the neglect of the injured party to maintain proper fences. Appellant insists that the question of the sufficiency of the fences can be raised only in an action of replevin for the property distrained. This position is not correct. The township trustees are fence viewers. Code, § 393. The determination by the township trustees that a party has sustained a given amount of damage by trespassing

2. ———:  
appeal: jurisdiction.  
decision.

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Duffee v. Judd.

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animals involves, necessarily, the conclusion that he is in a position which entitles him to some damages. Upon appeal this conclusion, as well as the one respecting the amount of damage, may be reviewed. 2. The other objection, respecting the obligation of the plaintiff to maintain a partition fence, has already been considered. In the admission of the proffered testimony there was no error.

III. The plaintiff introduced evidence tending to show that he had been damaged by defendant's cattle trespassing on his improved lands between sunset and sunrise, as well as in the daytime, and then offered testimony tending to show the amount of damages he had sustained by reason of the cattle of defendant trespassing on his lands, to which defendant objected, for the reason that the plaintiff had not proven that the damages were done within and upon the lands of plaintiff inclosed by a lawful fence, which objection was sustained by the court and the evidence excluded; but after the plaintiff had introduced evidence tending to show the condition of the fence, all of the foregoing evidence was admitted. This action of the court is assigned as error. The order of the introduction of testimony rests largely in the discretion of the *nisi prius* court, and as this testimony was all ultimately admitted, it is difficult to see how the appellant was prejudiced by the ruling. The same position is taken by appellant here as in the former objections, that if stock was prohibited from running at large defendant is liable, although the stock passed from his inclosure upon plaintiff's premises through a partition fence which plaintiff had neglected to maintain in proper condition. This position has already been sufficiently considered.

IV. Appellant assigns as error the refusal of the court to give certain instructions asked as to the rights and duties of the parties if they had agreed not to repair and keep up the division fence between them. We have none of the evidence in the abstract, nor does it, in any manner, appear that any evidence was introduced tending to prove such an agreement.

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 Peterson v. Espeset.
 

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It does not, therefore, appear that there was any error in refusing to give the instructions asked.

The record discloses no error.

**AFFIRMED.**

48	262
78	574

48	262
138	509
1138	510

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 PETERSON V. ESPESET.

1. **Replevin: EXECUTION: NOTICE.** An action to recover possession of specific personal property cannot be maintained against a sheriff who holds it by virtue of an execution, unless the plaintiff, prior to the commencement of the action, gives written notice of his ownership of the property.
2. ——— : ——— : ———. The fact that plaintiff's title and right of possession appeared of record would not relieve him from the necessity of giving notice.

*Appeal from Emmet Circuit Court.*

FRIDAY, APRIL 19.

REPLEVIN for cattle and horses described in the petition. Defendant demurred to the petition; the demurrer was overruled, and defendant standing thereon, judgment was rendered for plaintiff. Defendant appeals. The facts of the case appear in the opinion.

*E. B. Soper*, for appellant.

No appearance for appellee.

BECK, J.—I. The petition alleges that plaintiff is the owner of the property described, and entitled to the possession thereof. He shows that he acquired title to the property under a sale upon a mortgage, which, before foreclosure, was assigned to him. He further alleges that defendant holds possession of the property as sheriff, hav-

1. REPLEVIN:  
execution;  
notice.

ing levied an execution thereon, which was issued upon a judgment against the mortgagor.

The demurrer was based upon the ground that the petition does not show that plaintiff notified defendant, in writing, of his claim to the property, before bringing suit, as is required by Code, § 3055.

The demurrer was erroneously overruled. The precise point is ruled in *Kaster & Furrell v. Pease*, 42 Iowa, 488, and that case is followed in *Finch v. Hollinger*, 43 Iowa, 598. It is unnecessary to say anything here in support of these decisions.

II. This case is not distinguishable from the first just cited, on the ground that plaintiff's title and right of possession of the property appears of record by reason of the mortgage under which he claims title. It surely cannot be claimed that a title of personal property based upon a record will give the owner greater rights than he would hold if the title rested in parol. The statute under which the foregoing decisions were made requires the officer to levy upon property pointed out by the plaintiff, and protects him in such levy, unless written notice be given him of the right of the claimant. Now, it cannot be claimed that the plaintiff cannot direct a levy upon property the recorded title of which is held by another.

But this question is really not in this case, for the petition does not show that the mortgage or mortgage sale was of record.

The petition does not show that plaintiff was in possession of the property when levied upon, or that it was not in the possession of the execution defendants. We must presume that the levy was lawfully made, as required by Code, § 3055; that the property was in the possession of the execution defendants, or that the sheriff had reason to believe that they owned it, or that the plaintiffs in execution directed the levy. In any one of these cases the levy is lawful, and the sheriff is

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 Arthur v. Craig.
 

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protected from an action until the written notice is given him. We are to presume that officers act rightly: we must in this case give the benefit of such presumption to the petition of plaintiff.

No other question arises in the case.

REVERSED.

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 ARTHUR V. CRAIG.

1. **Pardon; POWER TO GRANT CONDITIONAL.** The Governor of the State has the power to annex to a pardon any condition precedent or subsequent, provided it be not illegal, immoral, or impossible to be performed.
2. **—: REVOCATION OF.** Where a pardon was granted upon certain conditions, and it was stipulated therewith that upon any violation of such conditions the party pardoned should be liable to summary arrest, and to confinement in the penitentiary for the remainder of the term for which he had been sentenced, and it was further stipulated that the judgment of the executive should be conclusive as to the violation of the conditions of the pardon: *Held*, that upon the violation of the conditions of the pardon the legal status of the party became the same as it was before the pardon was granted.

*Appeal from Lee District Court.*

FRIDAY, APRIL 19.

On the 2d day of December, 1872, Richard D. Arthur was, by the judgment of the District Court of Fayette county, sentenced to the penitentiary of this State for the term of ten years, for the crime of larceny from a building in the night time.

On the 4th day of January, 1876, his Excellency, Samuel J. Kirkwood, then Governor of this State, granted to said Arthur a conditional pardon, the conditions being in these words:

## Arthur v. Craig.

"This pardon is granted upon the following conditions, and acceptance and release under this instrument shall be an acceptance of each and all of such conditions, viz: *First*, said R. D. Arthur shall, during the remainder of the term of his sentence, refrain from the use of intoxicating liquors as a beverage; *second*, he shall, during that time, use all proper exertion for the support of his mother and sister; *third*, he shall not, during said time, be convicted of any offense against any of the criminal laws of the State. Should said Arthur violate either of these conditions he shall be liable to summary arrest upon the warrant of the Governor of the State for the time being, whose judgment shall be conclusive as to the sufficiency of the proof of the violation of the first and second conditions, and to be confined in the penitentiary of the State for the remainder of the term of his sentence, and this instrument to be summarily revoked."

Said pardon was thus indorsed: "I accept the within pardon with all its conditions.

"(Signed)

R. D. ARTHUR."

And upon the face of said instrument the following appears: "I subscribe to the above."

On the 26th day of March, 1877, his Excellency, J. G. Newbold, then Governor of this State, issued his warrant setting forth said conditional pardon, and reciting the violation thereof as follows:

"And, whereas, said Arthur has, as I have been informed, and am convinced, violated the first of the conditions of the pardon aforesaid, by drinking intoxicating liquors repeatedly, so much so as to become intoxicated, and, moreover, has been guilty of criminal practices which, while not of themselves constituting a violation of said conditions, are yet of such a nature as to aggravate his offense, in violation of said first condition."

Said warrant proceeds as follows:

"Now, therefore, by virtue of the authority vested in me by law, and by reason of the reservation in said conditional pardon, and of the violation aforesaid, I, J. G. Newbold, Governor

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Arthur v. Craig.

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of the State of Iowa, do hereby revoke said conditional pardon, and do remand said Richard D. Arthur to the penitentiary of the State, there to be confined for the remainder of the term for which he was originally committed to said penitentiary, and I do hereby require all peace officers within the State, to whom this may be shown, to aid and assist in arresting and returning said Arthur to said penitentiary."

In pursuance of said warrant the said Arthur was arrested and returned to the penitentiary.

He thereupon instituted this proceeding in *habeas corpus*, setting forth the foregoing facts, and claiming that his imprisonment was illegal, on the grounds—*First*, because the Governor has no power to limit a pardon, and make it dependent upon conditions, and that the pardon is absolute, and the conditions void. *Second*, if the Governor has power to pardon conditionally, judicial authority must be invoked, and determination had upon the question as to whether or not he has forfeited his liberty by the violation of the conditions of his pardon. The Governor having no judicial power in this respect cannot issue a warrant of arrest or *mittimus* to imprison, such authority belonging exclusively to the courts.

There was a demurrer to the petition upon the ground that petitioner "was pardoned conditionally, and that by the terms of the grant he was to be re-incarcerated in case of violation, and whenever the executive should so determine, and defendant is justified in holding petitioner by the warrant, a copy of which is set out in the petition."

The demurrer was overruled and the petitioner was discharged. Defendant appeals.

*J. F. McJunkin, Attorney General, and D. N. Sprague, District Attorney, for appellant.*

\* *F. H. Semple and J. H. Craig, for appellee.*

Arthur v. Craig.

ROTHROCK, CH. J.—I. The first question presented is: has the Governor of this State power to grant a conditional pardon? The Constitution, § 16, art. 4, provides: "The

1. PARDON :  
conditional  
may be  
granted.

Governor shall have power to grant reprieves, commutations, and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law." The only restrictions upon the pardoning power imposed by law relate to pardons for murder in the first degree. Code, § 4712. As to all other crimes the power to pardon is given by the Constitution, unrestricted by any statute.

In vol. 4, p. 401, of Blackstone's Commentaries, it is said: "A pardon may also be conditional; that is, the king may extend his mercy upon what terms he pleases, and may annex to his bounty a condition, either subsequent or precedent, on the performance whereof the validity of the pardon will depend; and this is by the common law." This rule has been followed by adjudications in England, and has been so generally adopted by the courts of this country, under constitutions providing an unrestricted pardoning power, that the law must now be regarded as settled that the executive may annex to a pardon any condition, precedent or subsequent, provided it be not illegal, immoral, or impossible to be performed. *People v. Potter*, 1 Parker, 47; 1 Bishop Crim. Law, §§ 711, 712; *United States v. Wilson*, 7 Peters, 150; *Ex-parte William Wells*, 18 Howard, 307; *Flairlis' Case*, 8 Watts & Sargent, 197; *State v. Smith*, 1 Bailey (S. C.), 203.

II. The remaining question in the case is as to the effect to be given to a conditional pardon.

In *State v. Smith*, *supra*, it is said: "A pardon *ex vi termini* presupposes a wrong done, or an offense committed, and forgiveness of the offender by the party injured; and as the act of pardoning must necessarily be voluntary, the injured party must have the power of prescribing the atonement to be made; and it necessarily follows that the offender has the right to accept or not to accept

2. \_\_\_\_\_ : revo-  
cation.



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Arthur v. Craig.

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the terms proposed. He may prefer to make the reparation demanded by the law for the wrong done or offense committed, or the atonement substituted, at his election." The petitioner in this case was serving a sentence imposed by the law for a crime committed. He had no legal right to demand a release from imprisonment. The pardon offered to him was an act of grace or favor upon the part of the State by its executive. He was free to accept the pardon with its conditions, or to reject it, and serve out his sentence. He chose the former, accepted the pardon, and stipulated that for a violation of the conditions the instrument might be summarily revoked by the Governor, and he should be remanded to the penitentiary for the remainder of the term of his sentence.

The conditions imposed are not illegal, immoral, or impossible to be performed, and to enforce them deprives the petitioner of no legal right. It may further, with propriety, be said that if the Governor issued his warrant for the arrest and imprisonment of the petitioner upon an insufficient showing that he had violated the conditions of the pardon, and he should be required to serve out the remainder of his term, he will only perform that which the law, by his sentence, solemnly adjudged to be just.

The court below overruled the demurrer upon the ground that the Governor could not, without notice to the petitioner, and without a hearing, determine the conditions broken, and on his warrant imprison in the penitentiary, and that he could not exercise the judicial functions necessary to determine the question, because the Constitution gives these powers to the courts alone.

Certain adjudicated cases are relied upon as holding that a violation of a conditional pardon "should be judicially determined and the execution of the sentence enforced by the court pronouncing it, or some other court of competent jurisdiction. *People v. Potter*, 1 Parker Crim. R., 47; 9 Ind., 20; *Commonwealth v. Foulter*, 4 Call (Va.), 35.

## Rawson v. Harger.

Without entering into a discussion of the questions which are determined in these cases, it is sufficient to say that the instrument in the case at bar is unlike any to which our attention has been called. It expressly provides that the Governor may by his warrant revoke it upon such showing of a violation of the conditions as he may deem sufficient.

Upon its revocation the legal status of the petitioner must be regarded the same as it was before the pardon was granted. It must be remembered that the pardon was an act of grace. The petitioner had no right to demand it. It was founded on no right which he could enforce in any court. What he accepted was in the nature of a favor or gift. It was not such a contract as entitled him to have a judicial determination of forfeiture, in the face of his stipulation that the Governor might revoke it upon such showing as might be satisfactory to him.

We think the demurrer should have been sustained, and the petitioner should have been remanded to the penitentiary.

REVERSED.

## RAWSON V. HARGER.

1. **Patent; VALIDITY: VENDOR AND VENDEE.** In the sale of a patent the patentee is not bound in the absence of fraud by any representation respecting the validity of the patent, nor has the vendee any right to rely upon such representation.
2. —: **NOVELTY.** Nor can the vendee rely upon the representation of the patentee that his invention is novel, and that he is the original discoverer of the principle involved therein.
3. —: **JURISDICTION.** Whether or not the State courts have jurisdiction to determine whether a machine which has been patented is novel, *quære*.
4. —: **CONTRACT: EQUITABLE JURISDICTION.** If fact of the novelty of the invention is equally unknown to both the parties to a contract for the sale thereof, or if each has equal means of information, equity will not interfere to relieve either from the obligations of his contract, where the parties thereto have acted in good faith.

48	269
115	65
48	269
130	629

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Rawson v. Harger.

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*Appeal from Polk District Court.*

FRIDAY, APRIL 19.

IN 1869 the defendant claimed to be the owner of a patent right for an alleged improvement in steam furnaces for fanning the fire, commonly called a blower. At that time, and subsequently, in consideration of the conveyance by the plaintiff of certain real estate, and promissory notes given him, the defendant sold and assigned said patent for certain specified territory to the plaintiff. The latter claims he made said purchase through and by reason of certain false and fraudulent representations of the defendant; and that the defendant was not the original discoverer thereof; and that the patent was null and void. He also claims defendant surrendered said patent without the knowledge of the plaintiff, and procured a reissue thereof, which is less than, and dissimilar to, the original. This action is an equitable action, and seeks to obtain a rescission of the contracts and a re-conveyance of the real estate. There was a reference, and the referee found for the plaintiff, which was set aside by the District Court, and a decree entered dismissing the petition. The plaintiff appeals. The cause is triable *de novo* in this court.

*C. C. Cole and Jas. Embree, for appellant.*

*Clark & Connor, for appellee.*

SEEVERS, J.—To use the language of counsel for the appellant, "A rescission, recovery and reconveyance is grounded upon the alleged false and fraudulent representations by the defendant respecting the said patent, to-wit: that the patent was a valid one; that the defendant was the inventor thereof; that it was entirely new and of great utility; whereas the patent was not legal or valid, nor was the defendant the original inventor, nor was it entirely new, or of any utility or value; that said representations were relied upon by the

## Rawson v. Harger.

plaintiff, but were false, to the knowledge of defendant. It is further claimed as a ground of recovery that, after the sale of the patent to the plaintiff, the defendant surrendered that patent, and obtained a re-issue which is less than and dissimilar to the original, and entirely worthless, and wanting in novelty." It is also stated by such counsel: "The plaintiff's right to recover is not based on warranty, but on false representations; for mistake; for fraud."

So far as deemed necessary, the several grounds upon which the relief asked is based will be now considered.

I. As to fraud and misrepresentations. A careful consideration of the evidence, in connection with the exhaustive argument of counsel, fails to satisfy us that any such were made. On the contrary, we are strongly impressed with the belief the defendant fully believed all he told the plaintiff. The most that can be claimed in this respect is that he was mistaken in the representations made, but that he honestly believed them to be true.

II. As to the validity of the patent. Without doubt the defendant represented he had a patent regularly and properly issued by the United States government. The only representation of fact, however, was that he had a patent. This was true; whether it was valid or not, in the absence of fraud, was a question of law, and he was not bound by such statement, nor had the plaintiff a right to rely thereon.

III. As to the utility. All the witnesses who speak on this subject agree the machine is useful, the plaintiff himself being among the number. Such being the case, it cannot with propriety be said there was an entire failure of consideration.

IV. As to novelty and that the defendant was the original discoverer. In one respect it can be well said the defendant was the inventor. He had procured a patent valid on its face. *Prima facie* he was the owner of something of value. He might well so represent unless he knew

1. PATENT:  
validity:  
vendor and  
vendee.

2. ———:  
novelty.

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 Rawson v. Harger.
 

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otherwise. But we are unable to find he represented it to be new, or that he was the first discoverer of the principle patented. It may be admitted the plaintiff so testifies, but this is denied by the defendant. The burden is on the plaintiff. There is nothing which will warrant us in finding either of these persons have made any false statements. They understood the transaction differently; at least this is the charitable view, and we believe the correct one. Neither of them is materially supported by the testimony of other witnesses.

There is also another view that may be taken. Whether he was the inventor of a new or novel machine the defendant could not possibly know, unless he had been so informed, and had reason to believe the information to be true. At the time of some of the transactions between these parties, the plaintiff had fully as much knowledge, as appears from the evidence, as the defendant. There were rumors that the machine was not new, and that defendant was not the original discoverer. The existence of such rumors came to the plaintiff's knowledge before he made at least some of the purchases.

But, conceding the defendant represented as claimed, we regard it as doubtful whether the plaintiff could properly rely thereon. In the nature of things the plaintiff should have known the defendant had no such knowledge.

Such a representation may be well likened to one where a party represents there is some kind of mineral underlying the surface of land. This, at best, is a mere opinion, and no one should be allowed to rely thereon and have a contract set aside based on such a representation. In such case, and in the one at bar, both parties have equal knowledge, and contract accordingly.

V. It is claimed the evidence clearly shows the machine patented was neither new nor novel, and that in entering into the contract both parties undoubtedly supposed it to be so.

3. ———: *juris-* Therefore, this constituted a mistake of fact, and  
*diction.* entitles the plaintiff to the relief claimed. If this  
 be conceded, it is insisted, on the other hand, that State courts

## Rawson v. Harger.

have no jurisdiction to determine the question; because, to do so, the validity of the patent is solely involved, and as to such question the United States courts have exclusive jurisdiction. This question has never been decided by this court. The only cases bearing thereon cited by counsel are *Hunt v. Hoover*, 24 Iowa, 231; *Hall et al. v. Orris et al.*, 35 Id., 366; and *Percival v. Harger*, 40 Id., 286. We do not now feel called upon to determine this question, and therefore shall not stop to point out the difference between this case and those determined by other courts upholding the jurisdiction of the State courts.

VI. It is the established rule, if the subject-matter of the contract in this case, the novelty of the invention, was "equally unknown to both parties, or where each had equal knowledge and adequate means of information, or where the fact is doubtful from its own nature, in every such case, if the parties have acted with entire good faith, a court of equity will not interpose." 1 Story's Equity, § 150; *McCobb v. Richardson*, 24 Me., 82.

We are impressed with the belief both parties acted in good faith and believed the machine to be valuable, and that neither knew it was wanting in novelty at the time any of the contracts were made. Both of them knew there were doubts in relation thereto, but one knew, or could by the exercise of reasonable diligence have known, as much as the other. The fact of novelty was doubtful. Neither of them could know how this was until the question had been adjudicated. Both may have had opinions on this subject; but, whatever such opinion may have been, its truth could not have been tested with an approach to accuracy. It seems to us the facts in this case bring it fully within the foregoing rule.

But conceding there is a want of novelty in the invention, is the plaintiff entitled to the relief asked? Even if this were an executory contract, we understand the well settled doctrine to be that when a party has the right to rescind, on the ground of fraud or mistake, such right must be exercised

at the time discovery is made, or within a reasonable time thereafter. *Holdbrook v. Burt*, 22 Pick., 546; *Garling v. Newell*, 9 Ind., 572; *Lawrence v. Dale*, 3 Johns. Ch., 23; *Hoffman v. Noble*, 6 Met., 68. No rule can be laid down applicable to all cases. What is a reasonable time depends upon the property, parties, and circumstances existing at the time the attempt to rescind is made.

In *Kingsley v. Wallis*, 14 Me., 57, it was held the lapse of less than three months deprived the party of the right to rescind. This case was in relation to a patent right, and the right to rescind was reserved in the contract.

The plaintiff made his first purchase on the 19th day of July, 1869; his second on the succeeding day; his third on the 11th day of October following, and his fourth and last, as we understand, on the 6th day of March, 1872. At each of these purchases a portion of the real estate in controversy was conveyed to the defendant, and the patent, for certain described territory, duly transferred to the plaintiff. So far as the real estate is concerned, the contracts were wholly executed.

This action was commenced in April, 1874. An answer was filed, and the cause thus stood, without anything further being done, until April, 1876, when an amended petition was filed, and a hearing had as soon thereafter as could be.

A short time before the action was brought, the plaintiff, for the first time, offered to rescind and re-assign the patent, and demanded a reconveyance of the real estate.

As early as October, 1869, the plaintiff learned that some, if not many, persons asserted the invention was wanting in novelty.

The case of *Percival v. Harger*, before cited, in which the validity of this same patent was involved, was then pending. The plaintiff had knowledge of this suit, and talked with one of the plaintiffs therein in relation to the matters involved, and thereafter made two of his purchases.

In 1870 he gave a party a power of attorney, and authorized him to sell the patent within certain territory. From

this person he learned sales could not be made, because the novelty of the patent was doubted, and yet, nearly two years afterward, he made another purchase.

The value of a patent is purely speculative. It may be worth much or little. He who buys takes his chances, and if, legally or equitably, he can repudiate the contract, he should do so at least within a reasonable time after he has knowledge of the existence of the cause, or, if he has sufficient knowledge to put him on inquiry, we think he should prosecute the same with reasonable diligence, or be barred of his right. Where the property is of such a character a shorter delay will bar equitable relief than in other cases. Kerr on Fraud and Mistake, 306.

The plaintiff, for several years, made efforts to sell the patent, and used and controlled it as his own, and made no move toward rescinding until nearly five years after his first purchase, and two years after his last.

It cannot be in accord with any equitable principle for the plaintiff, for so long a period of time, to take the chances of large gains, and, failing in this, ask and obtain a rescission of the contract, the subject-matter of which is acknowledged to be of value. Instead of being swift, he has been exceedingly slow. In the meantime, he was weighing the chances of success. Under the circumstances, he must abide the consequences of this speculation.

VII. As to the surrender and reissue, we are unable to say the plaintiff lost anything thereby. On the contrary, it seems to us that whatever there was of value in the old was retained, with a claimed improvement, in the reissued patent. Before the patent had been reissued, the plaintiff had knowledge of the application therefor, and in October, 1869, accepted the benefits and advantages thereof in case one should issue. And a few days after the reissue was made, and in October, 1869, the defendant, at his request, assigned and transferred to the plaintiff such new patent for the territory purchased.



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Kanke & McKinley v. Herrum.

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Under these circumstances, plaintiff has not, at this late day, any just ground of complaint by reason of the reissued patent.

We have carefully read the evidence as to the Orwig transaction, and are of opinion the plaintiff has no just ground of complaint here. A reference to the evidence and a statement of our reasons would be of no advantage, and, besides, this opinion is already sufficiently lengthy.

**AFFIRMED.**

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KANKE & MCKINLEY V. HERRUM ET AL.

1. **Record of Judgment: DESTRUCTION: COSTS.** The costs in a proceeding to restore the record of a judgment which had been destroyed, if the motion is resisted and is sustained by the court, should be taxed against the losing party.
2. ———: **JURISDICTION.** In such a proceeding the only questions for determination are the prior record of the judgment, and its destruction. The regularity of the judgment or its validity cannot be inquired into therein.

*Appeal from Emmet District Court.*

FRIDAY, APRIL 19.

PROCEEDING by motion to restore a record of a judgment against defendants and in plaintiffs' favor, which had been destroyed by fire. The motion was sustained, and the costs, except those made in resistance of the motion, were taxed to the plaintiffs. From the order taxing the costs to them, the plaintiffs appeal; from the order restoring the judgment, the defendants appeal.

*E. B. Soper*, for plaintiffs.

*Geo. E. Clark and Hawkins & Jones*, for defendants.

BECK, J.—I. Plaintiffs introduced proof by affidavits in support of their motion, showing that a judgment had been

II. The plaintiffs' appeal involves the question of the correctness of the court's order taxing costs against them. We think it erroneous.

Code, § 2933, provides as follows: "Costs shall be recovered by the successful against the losing party. But where the party is successful as to a part of his demand, and fails as to part, unless the case is otherwise provided for, the court may, on rendering judgment, make an equitable apportionment of costs."

**1. RECORD of judgment: destruction: costs.**

The defendants resisted plaintiffs' motion, and were the losing parties. While neither party was in fault, on account of the destruction of the record which created the necessity of the proceeding, yet the fault of the defendants in resisting the relief sought by plaintiffs, rendered the making of costs necessary. Had defendants assented to the restoration of the record, process may have been unnecessary. Neither would they have stood in the position of a losing party, for they would have claimed nothing and therefore would have lost nothing. If, therefore, process had been served by plaintiffs, they could, upon appearing and consenting to the restoration of the record, have claimed that they were not the "losing party," and therefore not liable for costs. The fact that the restoration of the judgment was necessary for defendants' protection, because they could not have safely paid it

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Kanke & McKinley v. Herrum.

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until restored, cannot be urged in their favor, in view of their resistance to the proceedings.

Defendants were not partly successful in the proceeding, so that they could claim an apportionment of the costs under the statute above cited.

We conclude that the District Court erred in taxing any portion of the costs to plaintiffs.

III. The defendants, upon their appeal, insist that the testimony before the court was not sufficient to authorize the judgment, and that, as defendants denied the authority upon which the judgment was confessed, they were entitled to a trial, as in an action at law upon an issue involving that fact.

In the first place, the abstract shows that the clerk of the court and plaintiffs' attorney unite in affidavits showing the prior existence of the record of the judgment and its destruction. One of the defendants denies the authority to enter the judgment, but does not directly deny its prior existence. Upon this evidence the court was well warranted in granting the order of restoration.

The prior existence of the record and its destruction were the only matters in issue before the court. These being established, the restoration was properly ordered. The absence of authority to enter the judgment, or other matters affecting its regularity, or even its validity, were not involved in the proceeding. These, if they exist, and are of such character that they may be urged against the judgment, may be the ground of relief in other proceedings to be instituted by defendants. If such matter could be used to assail the original judgment, were it now in existence, they may be used with like effect against the judgment as restored.

But it is not shown that testimony other than that found in the abstract was not introduced in support of the court's action. Even if we do not regard the testimony before us sufficient to satisfy our minds upon the issue raised, we cannot disturb the order of restoration in the absence of a show-

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Burns v. The Iowa Homestead Co.

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ing that we have before us all the testimony submitted to the court below.

The court below did not err in the order restoring the judgment.

No other questions arise in the case. The judgment of the District Court is

REVERSED UPON PLAINTIFFS' APPEAL,  
AFFIRMED ON DEFENDANTS' APPEAL.

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BURNS ET AL. V. THE IOWA HOMESTEAD CO.

1. **Pleading; EVIDENCE; VARIANCE.** In an action for damages for breach of a covenant of warranty, plaintiff alleged that he subsequently acquired title from the paramount owner, the Des Moines Valley Railroad Company: *Held*, that he could not be permitted to prove that he acquired his title from the Des Moines & Fort Dodge Railroad Company.

*Appeal from Webster Circuit Court.*

FRIDAY, APRIL 19.

IN 1865 the plaintiff Maria L. Burns purchased of the defendant eighty acres of land for a consideration of \$400, and received defendant's conveyance therefor. Said conveyance contained a covenant to warrant and defend the title to said premises against all persons.

The defendant had not then and never since has had any right or title to said land.

It is averred in the petition that in July, 1874, the Des Moines Valley Railroad Company, being then the owner in fee of said land, and the holder of the paramount title under a conveyance from the State of Iowa, asserted its title against the plaintiff M. L. Burns, and claimed the occupancy and possession of said land; and on that day the said plaintiff

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Burns v. The Iowa Homestead Co.

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contracted with said railroad company for the purchase of said land, and received its contract therefor, paying, as the purchase price to said railroad company, the sum of \$280; that on the 20th day of November, 1875, she received from said railroad company a conveyance for said land; that said conveyance was made to plaintiff J. D. Burns, in trust for, and to the use of, the plaintiff M. L. Burns.

The defendant answered, admitting the execution of the deed for the consideration therein named, and that it contained the covenant of general warranty, and denying all the other allegations of the petition, and pleading the statute of limitations in bar of the action.

The cause was tried by the court, by consent of the parties, and judgment was rendered for plaintiff. Defendant appeals.

*Chas. A. Clark*, for appellant.

*A. N. Botsford*, for appellee.

ROTHROCK, CH. J.—I. The evidence of title showed that at the time the defendant conveyed the land to the plaintiff Maria L. Burns it had no title thereto, and it was admitted by the defendant that the documentary evidence of title shows that the paramount fee simple title was \* \* \* in the Des Moines Valley Railroad Company at the time plaintiff Maria L. Burns claims to have purchased from that company.

Plaintiffs did not offer in evidence any conveyance from the Des Moines Valley Railroad Company to J. D. Burns, as alleged in the petition, but offered a conveyance made by the Des Moines and Fort Dodge Railroad Company to said Burns.

Said conveyance did not purport to be a conveyance "made to the plaintiff J. D. Burns, in trust for, and to the use and benefit of, the plaintiff M. L. Burns," but the same was a conveyance with covenants of general warranty to J. D. Burns, and to his use alone.

The defendant objected to the introduction of this deed as

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Burns v. The Iowa Homestead Co.

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immaterial and incompetent. The objection was overruled, and the deed was admitted in evidence.

The plaintiff then offered parol evidence tending to prove that she in fact paid the purchase money for the paramount title, and that a deed was taken in the name of her husband, J. D. Burns, at her request and for her benefit. This evidence was objected to because the petition sets out an express trust—a trust appearing upon the face of the instrument, and the plaintiff could not, under the petition, recover by showing by parol a resulting trust.

It is undeniable that the petition is indefinite and uncertain as to the character of the trust by which plaintiff claims to hold. The allegation is not specific that the deed itself contained the evidence of the trust. That the "conveyance was made to J. D. Burns in trust for, and to the use and benefit of, the plaintiff M. L. Burns," is not a distinct allegation that the trust appeared upon the face of the instrument.

It is, at most, indefinite and uncertain, but as the defendant allowed the trial to proceed without a motion for a more specific statement, we think the parol evidence was properly admitted.

II. It is further claimed that the parol evidence did not establish a resulting trust in Maria L. Burns. The only witnesses examined were the plaintiff J. D. Burns and his son. Both testify that the money which was paid for the paramount title was given by the son to his mother, Maria L. Burns, to buy the land, and that the money thus furnished to the mother was used in making the purchase. It is true J. D. Burns, on his cross-examination, testified that he had an impression that the land was to be bought with the money of the son, who was to have the land. But the son testifies that he expected his mother would repay him, but nothing was said about it; that there was no understanding whatever.

We think the evidence fairly shows a resulting trust in Maria L. Burns. It surely is not in the son, and J. D. Burns,

the holder of the legal title, is a party plaintiff in the action, insisting that the land is held by him in trust only.

The question is somewhat different from what it would be in an action between Maria L. Burns and the holder of the legal title.

III. The defendant insists that the deed from the Des Moines & Fort Dodge Railroad Company was improperly admitted in evidence, because the petition avers that the paramount title was acquired from the Des Moines Valley Railroad Company.

I. PLEADING:  
evidence;  
variance.

This point is well taken. The plaintiff claims to recover damages by reason of a purchase and conveyance from one party, and seeks to recover by proof of a conveyance from another.

This is not an immaterial variance between allegation and proof. It was certainly an issuable fact, and defendant took issue upon it by a general denial. The plaintiffs, when objection was made to the introduction of the deed, should have amended the petition to correspond with the proof.

The abstract presented by appellant purports to contain all the evidence and rulings of the court. The argument of counsel for appellee refers to a stipulation which, if we had before us, might probably relieve the case of this difficulty, but we have no additional abstract, and must determine the case upon the record presented.

For the error last above discussed, the judgment must be reversed and the cause remanded for a new trial.

**REVERSED.**

## THE STATE V. SILHOFFER.

1. **Criminal Law: JURISDICTION.** Where an information before a justice of the peace charged a party with the commission of two offenses, of one of which the court had jurisdiction and one it did not, and he was thereupon found guilty, *held*, that the fact that the court did not have jurisdiction of one of the offenses would not oust it of jurisdiction of the other.

*Appeal from Montgomery District Court.*

FRIDAY, APRIL 19.

THE facts are stated in the opinion.

*C. E. Richards* and *C. S. Murphy*, for appellant.

*J. F. McJunkin*, Attorney General, for the State.

SEEVERS, J.—What purported to be an information against the defendant was filed before a justice of the peace, as follows:

1. CRIMINAL  
law: jurisdic-  
tion

## "INFORMATION.

"THE STATE OF IOWA } "Before O. Miller, Justice of the Peace  
"AGAINST } of Montgomery County, State of Iowa.  
"HONIST SILHOFFER, }

"The defendant, Honist Silhoffer, is accused of the crime of selling intoxicating liquor, for that the said defendant, on the 22d day of June, 1877, at the township of Red Oak, in Montgomery county, Iowa, did own, use, and keep, control and manage a building for the purpose and intent of keeping and selling therein, in the State of Iowa, intoxicating liquors, contrary to law, and at the said time and place the defendant, in said building, did keep and sell, in the State of Iowa, intoxicating liquors, contrary to law, contrary to the statute in



Gow v. Tidrick

such case made and provided, and against the peace and dignity of the State of Iowa."

The defendant pleaded not guilty thereto. There was a trial, and he was found guilty, and the justice fined him twenty dollars and costs. He appealed to the District Court, where there was a trial by jury, and a verdict of guilty. A judgment for twenty dollars and costs was rendered against him, from which he appealed to this court, and now urges that the judgment rendered in the District Court should be reversed and set aside, because the justice of the peace had no jurisdiction of the crime charged in the information.

The justice had jurisdiction of the crime of selling intoxicating liquors, and this is clearly charged in the information. The fact, if it be true, that another crime is charged therein of which the justice did not have jurisdiction, should not, after judgment, be held sufficient to oust the justice of jurisdiction of the crime of which he had full and complete jurisdiction. The allegation of keeping intoxicating liquor, with an intent to sell, will be treated as surplusage. *The State v. Hayden*, 45 Iowa, 11.

**AFFIRMED.**

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GOW ET AL V. TIDRICK.

1. **Tax Sale; STATEMENT OF TREASURER: MISTAKE.** The fact that defendant's agent, sent to purchase a certain tract of land at tax sale, was informed by the treasurer through mistake that the taxes upon the land had been paid, was held not to avail defendant to defeat a tax title acquired by another to the land, where the defendant afterward purchased the land from the patent owner with knowledge of the tax sale, and before the expiration of the time for redemption therefor.

*Appeal from Adair District Court.*

FRIDAY, APRIL 19.

THE plaintiffs allege that they are the owners in fee simple and entitled to the possession of an eighty acres of wild.

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Gow v. Tidrick.

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uncultivated land, described in the petition, under a tax deed executed on the 23d day of November, 1874, pursuant to a sale had on the 21st day of November, 1871, for the delinquent taxes of 1871, and that the defendant makes some claim to the real estate in question adverse to the title of plaintiffs.

The defendant alleges that he is the owner of the land in fee simple; that the tax sale is void because of an unlawful combination between the bidders, and that the defendant was prevented from paying the taxes for which the land was sold, and from bidding at such sale, by the representation of the treasurer that the land would not be sold—that the taxes were paid.

The court found that the plaintiffs are the absolute owners of the land in question, and decreed that their title be confirmed, and that they be put in possession.

The defendant appeals.

*Brown & Dudley*, for appellant.

*Geo. L. Gow*, for appellees.

DAY, J.—I. No motion for trial on written evidence was made as contemplated in sec. 2742 of the Code. The cause is not, therefore, as has been settled by repeated decisions of this court, triable *de novo*. It can be reviewed only on errors duly assigned.

II. The allegation that there was a fraudulent combination amongst the bidders is not established by the proof. Even if we were to try this question *de novo*, we should, upon the evidence, be obliged to find as did the court below. *A fortiori* can we not disturb the court's finding, reviewed as in a law action, with the same presumptions in its favor as pertain respecting the verdict of a jury?

III. The defendant never offered nor proposed to pay the taxes for the year 1870. The sale was made on the 21st day of

Gow v. Tidrick.

1. TAX sale;  
statement of  
treasurer;  
mistake.

November, 1871. Defendant did not acquire title to the land till January 5, 1872. Defendant employed an agent to bid in the lands for him at the tax sale. It is claimed that the treasurer told the agent that the taxes had been paid, and refused to offer the land for sale. Defendant claims this was a fraud upon him, which vitiates the sale. We cannot see upon what principle defendant can claim that plaintiffs' tax title should be set aside, simply because defendant was not permitted to acquire a tax title to the land himself. It does not appear that the statement of the treasurer was fraudulent. The most that can be claimed for it is, that it was made under an honest mistake. In December, 1871, defendant was informed of the sale to plaintiffs. After he bought the land he had ample time to redeem from the tax sale. Failing to do so, he is without any standing in a court of equity, and is not entitled to any relief.

IV. It is urged that the court erred in not giving defendant judgment for the amount of taxes paid by him during the time following the sale, and before the tax deed was executed. No claim was made for such taxes in the court below. The defendant, in his answer and cross-bill, does not even allege that he paid such taxes. It does not appear that the question was passed upon at all in the lower court. It cannot, therefore, be considered here. We have considered the errors presented, notwithstanding the great doubt as to whether they were filed in time to be entitled to examination. We have waived this question, because, on the merits, the decision is right.

**AFFIRMED.**

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Duffees v. Sherman.

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## DUFFEES V. SHERMAN ET AL.

1. **Practice in the Supreme Court: RECORD.** A motion to dismiss an appeal on the ground that the record of the court below was not properly made, will not be sustained.
2. **County Seat: RE-LOCATION: REMONSTRANTS.** The names of persons appearing upon a petition for the submission of the question of the re-location of a county seat, which appear also upon a remonstrance against the submission of the question, are not to be counted on the petition.

*Appeal from Poweshiek District Court.*

FRIDAY, APRIL 19.

THIS is a proceeding by *certiorari* for a review of the action of the board of supervisors of Poweshiek county, in refusing to submit to the legal voters of said county the question of a relocation of the county seat of said county at Malcolm. The writ of *certiorari* was issued, as prayed, to which the defendants made return and answer. The plaintiff filed a reply. The court submitted a finding of facts and conclusions of law, and reversed the action of the board. The defendants appeal.

*A. W. Ballard and W. R. Lewis, for appellants,*

*Clark Varnum and J. F. Lacey, for appellee.*

DAY, J.—I. Appellee insists that no exceptions were taken and entered, as required by law, and, for that reason, moves to dismiss the appeal. The cause was, by agreement of the parties, submitted to the court, to be decided in vacation. The findings of facts and conclusions of law have attached to them the following statement: "To which findings of facts, and conclusions of law therefrom, and each one of them, defendants, at the time, duly excepted." Appellee has

1. PRACTICE IN  
the supreme  
court: record

filed what purports to be an amended abstract, stating that when the court filed his finding and conclusions these were not embraced therein, but that the same were inserted over the signature of the judge, by the clerk of the court, several days after the same were filed and entered of record. It is not, however, claimed that this statement is not in accordance with the fact, nor that the clerk made the correction without the authority or direction of the court. If the record made up in the court below does not correctly state the facts, it should have been corrected there. We cannot correct or change that record upon a motion to dismiss the appeal. The motion to dismiss appeal must be overruled.

II. The court found the facts to be as follows :

*"First—*That a petition was presented to the board of supervisors of Poweshiek county, praying that the question of 2. COUNTY SEAT: re-location of: remonstrants. the change of the location of the county seat from Montezuma to that of Malcolm, in said county, be submitted to the voters thereof, which said petition had attached thereto eighteen hundred and fifty-seven signatures, and was verified by affidavit as required by law.

*"Second—*Of the signatures to said petition, twenty-three were not legal voters, for various reasons; some not having been naturalized, others not having gained a residence, and still others having left the county.

*"Third—*Proper notice, as required by law, had been given of the filing and presentation of such petition, and for the length of time required.

*"Fourth—*Upon the trial before the board of supervisors a remonstrance was presented, with the signatures of one hundred and fourteen persons, and among this number were the names of several who had also signed the petition, but just how many were found to be upon both, by the board of supervisors, does not clearly appear. Some evidence was introduced tending to show that some of the names were upon both, and in other cases the board found that they were on account of the similarity of the names, and for this reason,

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Duffees v. Sherman.

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that is because the parties had signed both petition and remonstrance, and this was found as before stated, various other names were stricken off and not counted. Just how many, however, were so stricken off for this reason, it is difficult, if not impossible, to determine. In defendants' amended return, the number is stated to be sixty-one, and the names are given; but of these names so given, twenty-two were not signed to the petition, and six of them had been rejected for the reason that they were not legal voters.

*"Fifth—*There was some evidence tending to show that others besides the twenty-three names as above stated were not legal voters, and also evidence tending to show that they were, but the question was never passed upon by the board.

*"Sixth—*At the time of hearing the petition, those favoring the submission of the question presented, and asked leave to file, a supplemental petition, with seventeen additional names, the same being verified by affidavits, as required by statute, which was refused them by the board, and those remonstrating asked leave to file an additional remonstrance, which was duly verified, as was also remonstrance first filed, which was also refused by the board, and this additional remonstrance contained a few of those signing the petition.

*"Seventh—*That one-half the number of votes cast at the election next preceding the presentation of the petition was eighteen hundred and fifteen.

*"Eighth—*That the board, having found that there were among the signatures to the petition twenty-three who were not voters, then, without determining any other question, proceeded to reject a sufficient number of other signatures thereto, to reduce the number below eighteen hundred and fifteen, for the sole and only reason that they had signed both petition and remonstrance; and, having done so, ordered the petition dismissed, and refused to order the question petitioned for submitted to a vote; but no record was kept of the number so rejected, or of the names of such persons, or any rec-

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Duffees v. Sherman.

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ord, but the fact that the question was ordered not submitted, or, rather, the prayer of the petitioners was refused."

The court found the following conclusions of law:

"*First*—That the said board of supervisors erred in rejecting names from the petition for the fact alone that such petitioners afterwards signed a remonstrance.

"*Second*—That the said board of supervisors erred in dismissing the petition and in refusing to order the question submitted to the voters of Poweshiek county, as petitioned for, and as provided by statute."

Section 283 of the Code is as follows: "Remonstrances signed by legal voters of the county only, and verified in like manner as the petition, may also be presented to the board. If the same persons petition and remonstrate, they shall be counted only on the remonstrance, and if a greater number of legal voters remonstrate against the relocation than petition for it, no election shall be ordered." Section 285 provides: "Upon the presentation of such a petition, signed by at least one-half of all the legal voters in the county, as shown by the last preceding census, \* \* \* \* the board shall order that at the next general election a vote shall be taken between said place and the existing county seat."

These sections must be construed together, and so as, if possible, to give force and effect to all of their provisions. Section 283 provides, in plain and unambiguous language, that if the same persons petition and remonstrate, they shall be counted only on the remonstrance. When a petition is signed by a bare majority of the legal voters of a county, as shown by the last census, and some of these sign a remonstrance, is such petition signed by at least one-half the legal voters, as shown by the last census, within the spirit and meaning of section 283? We think not. The names on the petition which are also on the remonstrance are not to be counted on the petition. They are there, it is true, but they are there for no purpose, and can have no effect. They are to be treated and considered as though they had been obliterated

and erased. The petition is to be regarded as though they had never been there. In no other way can effect be given to the provision of section 283, that if the same persons petition and remonstrate, they shall be counted only on the remonstrance.

It often happens that the population of a county greatly increases between the time that the last census was taken and the time a petition is presented for the removal of a county seat. In such case a petition may be presented signed by a majority of the legal voters of a county, as shown by the last census, and a remonstrance may also be presented, not containing any names on the petition, and yet having a greater number of signatures of legal voters than are attached to the petition. In such case, under the latter clause of section 283, no election is to be ordered. This construction gives force to all the provisions of these sections, and that it is the proper one we have no doubt. A strong argument in favor of this construction can be drawn from the order in which these provisions appear in the original act, chapter 49, Laws 1862. In that act what has been codified as section 285 appears as section 4, whilst what is codified as section 283 appears as section 9. In the original act, section 283 appears as a limitation or qualification of section 285, its effect being that, notwithstanding the fact that a majority of the legal voters, as shown by the last census, petition for the submission of the question, yet, if a greater number remonstrate against it, the question shall not be submitted.

The court erred in the legal conclusion that the board of supervisors erred in rejecting names from the petition for the fact alone that such petitioners afterwards signed a remonstrance. See *Loomis v. Bailey*, 45 Iowa, 400.

REVERSED.



48	292
78	309
48	292
96	310

## ALBERTSON V. THE KEOKUK &amp; DES MOINES R. CO.

1. **Instructions:** TO BE CONSIDERED TOGETHER. The instructions in a case are to be read and considered as a whole, and an omission in one, if supplied in another, will not furnish ground for reversal.
2. **Negligence:** INJURY OF INFANT: RAILROADS. The father of an infant injured by a railway train cannot recover of the company for loss of services and expenses incurred by reason of the injury if the negligence of the parents contributed thereto, unless, notwithstanding such negligence, the injury might have been avoided by the exercise of proper care by the company's employees.

*Appeal from Wapello Circuit Court.*

FRIDAY, APRIL 19.

THE plaintiff's child, two years and one month old, was run over and injured by a train on the defendant's road, and this action is brought to recover for loss of service and expenses incurred in taking care of and nursing said child.

There was a jury trial, verdict and judgment for plaintiff, and defendant appeals.

*Stiles & Burton, Gillmore & Anderson, and John Fyffe, for appellant.*

*John B. Ennis and H. B. Hendershott, for appellee.*

SEEVERS, J.—I. Among others, the following instructions were given:

- "8. The rule that refuses damages for an injury to an individual whose negligence has, in any manner, contributed to produce the injury for which he sues, presupposes that he has reached an age when he has sufficient intelligence to know the existence of danger, and sufficient thought to protect himself from its consequences.

1. INSTRUCTIONS: to be considered together.

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Albertson v. The Keokuk & Des Moines R. Co.

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"9. This rule, therefore, does not, and cannot, apply to an infant of the age this child is shown to be, and if an infant of such age is found alone in a place where he is exposed to danger, and in a situation where he can easily be seen, it is the duty of every person approaching him to use all the care and caution that such person can command, to avoid injury to him, and if such person fails to use such care and caution, such person is guilty of negligence.

"Hence it is that if you find the engineer actually saw the child upon the track, ahead of the locomotive, or in such proximity thereto as rendered it reasonably apparent to him he was in danger from the train, it was the duty of the engineer to use promptly all the care and caution at his command to stop the train and avoid the injury to the child, and if he failed to do so, and by reason thereof the child was injured, then the defendant would be liable therefor, even though the parents of the child were also guilty of negligence in permitting the child to play where it would be exposed to passing trains.

"But if you find the speed of the train through the city did not exceed six miles per hour, and that the engineer was exercising due care in watching the track ahead of the train, and when the child was discovered by him, in the exercise of such care, that he promptly used all the care and caution he could command to avoid the injury, that the defendant would not be liable.

"13. It is the duty of those intrusted with the running of railway trains to keep a reasonably vigilant watch of the track ahead of the train, in the direction they are running, and to use all proper care and caution to avoid injuries to persons who may be on the streets through which the track of the road passes.

"If, therefore, the plaintiff's child was unattended, and upon the track, or in such position as to render reasonably apparent that it was in danger from the train, in time to have prevented the injury, by stopping the train, using such care and

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Albertson v. The Keokuk & Des Moines R. Co.

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caution as they could command, and those in charge of the train failed to discover the child in time to do so, by reason of not exercising reasonable care in watching the track ahead of the train, then this would be negligence, and if by reason thereof the child was injured, then defendant would be liable therefor, unless you further find that the plaintiff was guilty of negligence in permitting the child to be at large, unattended, exposed to danger from the passing trains, either by himself or mother in charge of the child at the time, and such negligence contributed to the injury, which would, in such a case, preclude a recovery by the plaintiff."

It is urged the first two are erroneous, but no objection is made to the last. The eighth and first paragraphs of the ninth instruction have been substantially, if not literally, copied from the opinion of this court in *Walters v. The C., R. I. & P. R. Co.*, 41 Iowa, 71. The action in that case was brought by the administrator of the child, and as this action is brought by the parent, the rule sanctioned in the former case, it is insisted, is not applicable in this, because what counsel claim is the well settled rule, that a parent cannot recover for an injury to a child to which his own negligence has contributed, has been ignored in the instructions objected to. It may be conceded that the established rule is as claimed, and yet the instructions are not necessarily erroneous. The established principle is that instructions are to be read and considered as a whole. In the thirteenth instruction, above set out in full, the jury are told that the plaintiff cannot recover if he was guilty of negligence in permitting the child to run at large unattended, and exposed to danger from passing trains. And in the sixteenth instruction, the jury were told "if the plaintiff took no precaution to keep the child in the house or yard, and failed to use ordinary precautions to do so, but suffered it to run out upon the street and railway track at will and pleasure, unattended, and unwatched, \* \* \* then he could not recover except as before explained."

Reading these instructions together, as should be done,

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Albertson v. The Keokuk & Des Moines R. Co.

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for they all bear upon the same branch of the case as to the objection now under consideration, the jury could not have failed to understand that the plaintiff could not recover if he was guilty of negligence which contributed to the injury.

The ninth instruction is further objected to, because "it holds that the company would be liable if the engineer failed  
 2. NEGLIGENCE: to use all the care and caution at his command,  
 injury of in-  
 fant: railroads. even though the parents of the child were also  
 guilty of contributory negligence, in permitting the child to  
 play where it would be exposed to passing trains."

The instruction is based on the theory that, under the evidence, the jury might conclude the engineer *saw* the child there; the instruction demanded he should use all the care and caution at his command to avoid injuring the child.

Certainly the negligence of the parents would not permit the engineer to run over the child. On the contrary, it is but reasonable, and the law demands, he should use all the care and diligence in his power to avoid such an injury as resulted in this case. Shearman & Redfield on Negligence, § 31, and authorities cited in note. *Morris v. The C., B. & Q. Ry. Co.*, 45 Iowa, 29. Especially is this true as to children of such tender years as the one in question. Wharton on Negligence, § 389 (a).

The defendant asked certain instructions which were refused, and it is urged the first, sixth and tenth should have been given. The first might have well been given, but no prejudicial error, we think, was caused by the refusal to do so. The instructions of the court were evidently drawn with great care, and with brevity, calmness and precision, and state the true and correct rules which should govern the jury in the determination of the questions submitted to them. In fact, the whole ground was well covered by the instructions given, and no prejudicial error could possibly be caused by the refusal to give those asked.

II. It is insisted the verdict is against the evidence, and counsel claim that "the onus rested on plaintiff to show one

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Hines v. The Whitebreast Coal and Mining Company.

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or more of the following things: that the train was running more than six miles an hour; that the engineer was not keeping a proper lookout over the track; that the child could have been seen by him before it was, or that, if not, he could have stopped the train in time to save it after he did see it." There was evidence tending to prove each of these several propositions, and as to all there was a conflict in a greater or less degree. Without doubt, the careful and painstaking judge before whom this cause was tried, and who heard the evidence and saw the witnesses, believed the testimony sustained the verdict, and under the settled practice of this court we cannot, under the circumstances, interfere.

**AFFIRMED.**

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HINES V. THE WHITEBREAST COAL AND MINING COMPANY.

1. **Practice : FORM OF ACTION.** Where several parties had commenced actions against a common defendant to enforce mechanics' liens, it was held to be competent for plaintiff and defendant, by agreement, to have united therewith an ordinary action at law, prosecuted by ordinary proceedings.

*Appeal from Lucas District Court.*

FRIDAY, APRIL 19.

THE facts of the case upon which the decision is based are stated in the opinion. There was a judgment for plaintiff in the court below. Defendant appeals.

*Stuart Bros. & Bartholomew, for appellants.*

*J. N. McClanahan and J. C. Mitchell, for appellees.*

BECK, J.—I. R. B. Williby and five others brought separate actions in their own names, severally, against defendant.

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Hines v. The Whitebreast Coal and Mining Company.

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They were sub-contractors under plaintiff, who had a contract with defendant for grading a side-track of a railroad, and for doing other work, and in their action seek to enforce their mechanics' liens. These causes were sent to a referee. Thereupon plaintiff and defendant entered into a written agreement, which was made of record, reciting that certain matters of dispute existed between them in relation to the performance of the contract on plaintiff's part, and agreeing that such difference should be submitted to the same person to whom the other actions were referred, "to be tried with them and at the same time, but so as not in any manner to interfere therewith, and that to this end said parties shall make up an issue between them before said referee, within sixty-five days from the rising of this court, said Hines becoming plaintiff and said Whitebreast Coal and Mining Company defendant." An order, in accord with and as contemplated by the agreement, was made by the court. Thereafter, plaintiff filed his petition against defendant, claiming to recover on two contracts. The petition claims judgment, without asking the enforcement of a mechanic's lien or setting up any claim therefor; it is in the form of such a pleading in an ordinary proceeding. Issues were formed thereon, and it appears that the case was submitted to the referee with the other actions. Afterward, it was agreed, by an instrument made of record, that "all the rulings, decisions and reports of the referee in these cases shall be set aside and counted for naught; that the case shall be returned to the district court for trial, and the parties will now proceed to take the evidence in the shape of depositions, and the causes shall be submitted to said court to be tried by said court without a jury, upon such depositions." Plaintiff afterwards filed a replication to defendant's answer, and thereupon the actions were submitted to the court and tried together. The judgment and decree of the court were recorded in one entry, preceded by the titles of the several causes. The plaintiff recovered judgment against the defendant in the sum of one thousand dollars, as in an action at law. The

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Hines v. The Whitebreast Coal and Mining Company.

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sub-contractors recovered separate judgments against Hines for the amount found due each severally, which were declared to be liens upon the side-track, and provisions were made for the enforcement thereof. The defendant appealed. It is not shown in what cases the appeal was taken. But it is presumed that it was intended to be from the decision made in all the cases. Defendant, however, raises no objection to the enforcement of the liens in favor of the sub-contractors. It is insisted that plaintiff was entitled to recover no greater sum than six hundred and sixty-eight dollars and forty-eight cents, and that the judgment is erroneous in being for a greater sum.

II. It clearly appears, from the foregoing statements of facts, that plaintiff instituted suit by ordinary proceedings against defendant. By agreement of the parties  
1. PRACTICE:  
form of action. it was tried with actions to enforce mechanics' liens brought by other parties, which are prosecuted by equitable proceedings. Code, § 2510.

We know of no reasons why the parties may not pursue this singular manner of settling their rights, in preference to the more regular manner, which ought to have been followed, by the plaintiff setting up his defenses in a cross-petition against defendant in the various actions brought by the sub-contractors, for he was united as defendant in those actions, and by answers to their petitions. The plaintiff and defendant chose to litigate the difference between them, involving the amount earned by plaintiff under his contracts, in a law action tried as above shown. This action is brought here by appeal. It is to be regarded here, of course, in no other light than a law action, for it is nothing else.

III. Having determined this point, the case is disposed of in this court. There were no exceptions taken in the court below to the judgment or any other rulings, and no errors are assigned in this court. No errors can be assigned, for they were not reserved by exceptions in the court below. We can do nothing but affirm the judgment.

Kellogg v. Aherin.

IV. As we have remarked, there is no question to be determined as between plaintiff and the sub-contractors in their actions, if, indeed, they are before us upon the appeal, for plaintiff presents no objections to the relief granted to the other parties, further than as it may be involved in the amount of the recovery, which is settled in the law actions.

AFFIRMED.

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**KELLOGG & HARRIS v. AHERIN AND MCGANN.**

1. **Fraudulent Conveyance: PARTICIPATION IN THE FRAUD.** Fraud will not be imputed in the conveyance of real estate unless there was participation therein both by grantor and grantee. The latter must have had knowledge of the grantor's fraudulent purpose, or of such other facts as would have put him upon inquiry, or must have neglected to make such inquiries as a reasonably prudent man would have done under like circumstances.
2. **Practice: CROSS-PETITION: AFFIRMATIVE RELIEF.** While no affirmative relief can be afforded the defendant unless it is claimed in a cross-petition, yet where such relief has been granted in the court below, without objection, the decree will not, for that reason, be reversed on appeal.

*Appeal from Plymouth Circuit Court.*

FRIDAY, APRIL 19.

THIS is an action in equity to set aside and declare void, upon the ground of fraud, a certain conveyance, by warranty deed, of eighty acres of land in Plymouth county, Iowa, made by defendant Aherin and wife to defendant McGann, on October 9, 1875, and to subject said land to the lien of an attachment sued out of the District Court of Plymouth county, in an action wherein Kellogg & Harris were plaintiffs and the above named Daniel Aherin was defendant; said suit in attachment having been commenced upon a foreign judgment rendered in the Circuit Court of Sauk county, Wisconsin, on

48	299
97	481
48	299
114	293
48	299
120	209
48	299
124	703



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Kellogg v. Aherin.

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September 30, 1875, against defendant Aherin, and in favor of plaintiffs herein, for four hundred and twenty-nine dollars and sixty-one cents debt, and one hundred and thirty dollars and six cents costs. After the commencement of this action the plaintiffs recovered judgment against the defendant Aherin, in said attachment suit, for the sum of five hundred and sixty-nine dollars and sixty-seven cents, and costs; and the land in controversy was ordered sold, to satisfy the judgment. The defendant McGann denies that he received the deed in question for the purpose of defrauding the creditors of Aherin, and alleges that he purchased in good faith, and paid a valuable consideration. Defendant prays that the writ of attachment be declared null and void, and that the title to the land be quieted in him.

The court dismissed plaintiffs' petition, and quieted the title to the lands in controversy in the defendant McGann. The plaintiffs appeal.

*Struble Bros.*, for appellants.

*A. W. Dudley*, for appellee McGann.

DAY, J.—I. The evidence shows clearly that the defendant McGann paid a sufficient consideration for the land. It is incumbent, therefore, upon the plaintiffs to prove fraud upon the part of the grantor, and participation in the fraud upon the part of the grantee, so far as to have knowledge of the grantor's fraudulent purpose, or knowledge of such other facts and circumstances as ought to have put the vendee upon such inquiry as would have led to an ascertainment of the truth, or as will afford reasonable ground for the inference that he purposely or negligently omitted to make such inquiries as an ordinarily prudent man in the same situation would make. *Steele v. Ward*, 25 Iowa, 537, *Drummond v. Couse*, 39 Id., 442; *Hopkins v. Lankton*, 30 Wis., 380. The burden of proof is upon the plaintiffs to establish these facts by satisfactory evidence. Fraud will never be imputed when the facts upon

which it is predicated may consist with honesty and purity of intention. *Lyman v. Cessford*, 15 Iowa, 229; *Schofield v. Blind*, 33 Id., 175; *Drummond v. Couse*, 39 Id., 443.

Testing the evidence by the principles enunciated in the foregoing cases, we are unable to find affirmatively that the defendant McGann is chargeable with a fraudulent purpose. All the facts and circumstances proved may reasonably consist with honesty of purpose upon his part. The evidence falls short of that satisfactory character which should be required in order to attach a fraudulent purpose to the defendant McGann, who seems to stand entirely indifferent as to Aherin, and to have no motive to assist him in the perpetration of a fraud. The case involves simply a question of fact. A review of the testimony in detail would swell the volume of our reports without subserving any practical or useful purpose.

Upon a careful examination of the evidence submitted, we are satisfied with the finding of the court below, dismissing plaintiffs' petition.

II. It is claimed that the court erred in quieting the defendant's title against the plaintiffs, as prayed in the defendant's answer, because the defendant filed no cross-bill.

1. PRACTICE:  
cross-petition:  
affirmative  
relief. Affirmative relief can properly be claimed only by cross-petition. But no objection was taken to the form of the pleadings in the court below. Such objection ought not, therefore, to avail now. We are not unmindful that the case of *McGregor v. McGregor*, 9 Iowa, 77, seems to be opposed to this view, but our conclusion is more in harmony with the more liberal spirit of legislation and judicial construction which prevails at the present day.

**AFFIRMED.**

## CHRIST V. POLK COUNTY.

1. **Fees : CITY MARSHAL.** Under section 536 of the Code, the marshal of a city is not entitled to recover from the county in which the city is located for services rendered in the administration of the criminal law.

*Appeal from Polk District Court.*

FRIDAY, APRIL 19.

THE plaintiff was marshal of the city of Des Moines from the 1st day of April, 1876, until the commencement of this action. As such marshal he made arrests, served processes, and did other acts incumbent upon him as duties pertaining to his office in cases wherein the State of Iowa was plaintiff. This action is brought to recover of Polk county for fees in such cases. The parties made a stipulation in regard to the facts, and also as to what questions of law should be submitted to the court. The stipulation is in the following words:

"1. It is agreed that the plaintiff was, at the time the services hereinafter referred to were rendered, the duly appointed and qualified marshal of the city of Des Moines, in the said county of Polk.

"2. That if the questions of law herein submitted to the court shall be decided in favor of the plaintiff, then it is agreed that he may have judgment for whatever amount the records of the police court of said city show him entitled to, as fees as such marshal involved in this suit, either as sheriff's or constable's fees, as shall be determined by the court."

The following questions of law are submitted to the court:

"1. Is the plaintiff, as marshal, entitled to any fees as claimed against the defendant?

"2. If so, is he entitled to sheriff's or constable's fees? If to both, then in what cases?

"3. Has the police court of the city of Des Moines, as a

## Christ v. Polk County.

court of record, jurisdiction to send persons to the reform school?

"4. Is the marshal entitled to fees for each calendar day for attending trial, when more than one trial is had on the same day, or is he entitled to one dollar for attending each trial, and when more than one trial is had on the same day?"

The court made a finding as follows:

"1. The plaintiff, as marshal, is entitled to fees against the defendant as follows: In such cases as pertain to the police court as a court of record, contradistinguished from State cases triable by a justice of the peace, and State cases that may be heard by a magistrate, he is entitled to sheriff's fees. In all cases coming within the jurisdiction of a justice of the peace, and a magistrate, he is to have the fees of a constable only.

"2. The police court is a court of record, and has a right to send persons to the reform school of the State.

"3. The marshal is entitled to fees as per case, and not by the day, except when a case runs over a day, when he is entitled to a case fee and one dollar for each extra day."

The defendant excepted to the finding of the court as to the first and third questions submitted, and also as to the fourth question submitted, so far as it holds that the plaintiff is entitled to fees as per case, and not per day, and also as to its ruling when the case runs over a day.

The plaintiff excepted to the ruling so far as it holds that the plaintiff can recover only constables' fees for such cases as come within the jurisdiction of justices of the peace and magistrates. Both parties appeal.

*Marwell, Lee & Witter*, for plaintiff.

*L. G. Bannister*, for defendant.

ADAMS, J.—In the view which we have taken of the case, it will be necessary to determine only the first question of law submitted.

1. FEES: city  
marshal.

The plaintiff's claim for fees, as against Polk county, is

based upon section 536 of the Code. That section provides that a city marshal "shall have, in the discharge of his proper duties, like powers, be subject to like responsibilities, and shall receive the same fees as sheriffs and constables in similar cases." The plaintiff claims that he has performed services of the same character as those which devolve upon a sheriff, and that the fair meaning of the statute is, that in such cases he shall not only receive the same amount of fees, but shall receive them from the same source.

So far as the source is concerned from which the fees are receivable (and this is the only question which we propose to consider) we do not think that the statute is susceptible of the construction which the plaintiff would put upon it. Holding, then, that it is not provided by statute that the county is liable, we do not think it can be so regarded. It is urged, however, by plaintiff that an express provision is not necessary. It is said that there are many public officers for whom the statute makes no express provision as to the source from which payment for their services is to be derived, and that the logical result of the doctrine enunciated would deprive such officers of all payment for their services. To this we think it may be said that in the absence of such provision the source of payment would ordinarily be sufficiently indicated by the character of the services or the character of the office. The services for which payment is sought in this case were rendered by the plaintiff, as marshal of the city of Des Moines. His office was a city office. Ordinarily city officers are presumed to be payable, not by the county, but by the city. Such a presumption must prevail in this case, in the absence of an express provision, unless there is something in the character of the services which calls for a different determination.

In support of the plaintiff's view, it may be said that the services were rendered in the administration of the criminal laws of the State, the expenses of which administration are certainly for the most part made by law chargeable upon the counties. But no one will deny that it is competent for the Legislature to impose such expenses in part upon cities. We

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York v. Wallace

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think it virtually so provided in providing the duty of city marshals. And, to our mind, the provision is not unreasonable. The citizens of a city are a part of the general public, and as such they have a general interest in the suppression of crime. In addition, they have what might not, perhaps, improperly be called a local interest, resulting from the local aggregation of property and people. The city marshal is provided as a peace officer, in addition to the county and township force of peace officers. So far as he earns fees in enforcing the criminal law, we think that the city may properly enough be charged with the payment. At all events we do not think that they are chargeable upon the county.

Upon the plaintiff's appeal, the judgment of the court below must be affirmed, and upon the defendant's

REVERSED.

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YORK V. WALLACE.

1. **Contract : EVIDENCE : VARIANCE.** Where the contract declared on was an agreement that the judgment debtor would elect to have his land sold subject to redemption rather than by appraisement, and the evidence showed the agreement to be an offer by the debtor to convey the land subject to the debt, it was held that the evidence did not establish the contract.
2. **Instruction : ASSUMPTION OF FACT NOT PROVED.** An instruction is erroneous which assumes an allegation, not established by the evidence, to be true.

*Appeal from Marshall District Court.*

FRIDAY, APRIL 19.

Action for damages for breach of an alleged oral contract. The defendant denies the contract. The contract, if any, was made between the defendant and one Weeks. Weeks assigned his claim for damages to the plaintiff, York. The circumstances under which the alleged contract was made are as

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York v. Wallace.

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follows: Weeks bought one hundred and sixty acres of land of the plaintiff, York, and gave him three promissory notes, one for five hundred dollars, one for one thousand dollars, and a third for five hundred dollars. York indorsed the first two notes to one Boardman, and the third to the defendant, Wallace, who indorsed it to Boardman. York, therefore, became liable as indorser upon all the notes, and Wallace upon one of them. The notes were secured by mortgage upon the land purchased. Boardman foreclosed, obtaining judgment against Weeks and York for the whole amount, and against Wallace for the amount of the note indorsed by him. An execution was issued in pursuance of the decree of foreclosure, and the mortgaged premises were sold subject to redemption. The contract, if any, was made just prior to the issuance of execution. It is set out in the petition in the following words:

"Defendant (Wallace) agreed that, in consideration that Weeks would file an election to have said mortgaged premises sold subject to redemption, he, said Wallace, would redeem the same from sheriff's sale, and pay off and satisfy the judgment, and thereby relieve the said Weeks from the obligation of said judgment, and hold him harmless on account thereof."

Weeks filed an election to have the land sold subject to redemption. It was bid in by Boardman, the execution creditor, for one thousand dollars, being less than one-half the debt. Wallace did not redeem, but purchased of Boardman the certificate of redemption and balance of judgment, acquired a sheriff's deed, and collected the balance of the judgment from York. York then purchased of Weeks his claim for damages against Wallace, and he brings this action to recover the same. There was a trial by jury, and verdict and judgment for the plaintiff for one thousand three hundred and thirty-eight dollars and fourteen cents. Defendant appeals.

*Boardman & Williams, for appellant.*

*Henderson & Merriam and Caswell & Meeker, for appellee.*

## York v. Wallace.

ADAMS, J.—The defendant assigns as error the giving of an instruction which is in these words: “If the jury find from the evidence that the defendant Wallace made an oral contract with H. M. Weeks, that the said Weeks should file his election to redeem the land described in the petition, and that, upon Weeks so doing, Wallace would assume and pay off the judgment against Weeks, and take the land, and that by the terms of the contract the same was to be performed within one year, and that the said Weeks filed said election in performance of his part of the contract, and you further find that the defendant failed to perform his part of the contract, that is, failed to pay off the judgment against said Weeks, and you further find that Weeks has duly assigned to plaintiff his right of action: if you find these facts the plaintiff is entitled to recover.”

The defendant insists that there was no evidence tending to prove such contract as is described in the petition and in the instruction. To prove the contract the plaintiff called Weeks, who testified in these words: “In the spring of 1871, the defendant and an old gentleman came to have me elect to redeem the land. I told him that I did not wish to—did not feel able, did not expect to, and would rather have it sold subject to appraisement, thinking that more would be realized, and having no other means to pay the claim. They went on to state that I could have the use of the place one year, and I said I wanted nothing to do with the farm if I could only get clear of the judgment, and I proposed to give immediate possession if he would assume the debt *in place of having the farm sold subject to redemption*, and he said he would do so.” The contract, as shown in evidence, it will be seen is different from that declared on. As shown in evidence, the consideration of the defendant’s promise was the farm itself, with the immediate right of possession. As shown in the petition, the consideration was merely the filing an election by Weeks to have the land sold subject to redemption. As shown in evi-



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York v. Wallace.

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dence, it appears to have been provided that the land should not be sold subject to redemption.

The evidence, therefore, does not establish the contract declared on, but shows terms inconsistent with it. The instruction assumed that the jury might find from the evidence that the contract had been established, and in this we think that the instruction was erroneous. Some confusion seems to have arisen by an attempt to show a contract made later, and by letter. Weeks testified that, after the oral contract was made, he received from the defendant a letter (which he has since lost), in which defendant requested that Weeks should file an election for redemption, and stated that defendant would see that the judgment was paid. This letter to Weeks seems to be relied upon by plaintiff, and yet it is evident that it cannot be, properly. In the first place, the plaintiff declares upon an oral contract, and proves an oral contract previously made. In the second place, it does not appear that Weeks notified defendant that he would assent to the defendant's proposition as contained in the letter. Indeed, it appears that not a word, by letter or otherwise, passed between Weeks and the defendant until long after the execution sale, and the expiration of the time of redemption.

An interesting question has been presented by counsel in regard to the nature of the consideration of the defendant's promise as averred in the plaintiff's petition.

It is insisted by the defendant that the filing of an election for redemption cannot be regarded, in contemplation of law, as suffering a disadvantage, and so would not constitute a sufficient consideration for the defendant's promise. With the view we have taken of the case, it is unnecessary to determine this question. The oral contract testified to by Weeks excluded such consideration, and set up a different one, to-wit: an agreement to grant the farm. Had the averment been such as to admit evidence of an agreement to grant the farm, the defendant contends that the evidence offered was

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Hartman v. Anderson.

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fatally defective in that it was not in writing, and this position, we think, is well taken. The plaintiff contends that the filing of an election for redemption was a part performance. In our opinion it could not have that effect. It was not a part of the contract, so far as shown in evidence, and what was done does not appear to have been done with reference to it. *Sweeney v. O'Hara*, 43 Iowa, 36. We are aware that Weeks reiterates that he would not have filed an election but for the contract. But the contract, as testified to by him as made prior to the receipt of the letter, was designed to obviate the necessity of a sale, and, of course, the necessity of filing an election for redemption.

We think that the judgment of the District Court must be

REVERSED.

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## HARTMAN V. ANDERSON.

1. **Tax Sale: REDEMPTION.** The treasurer has no right to disregard the act of the auditor in permitting redemption from tax sale to be made, and after such redemption to execute a deed to the tax purchaser.

*Appeal from Warren Circuit Court.*

FRIDAY, APRIL 19.

On the 9th day of October, 1872, the plaintiff purchased a certain tract of land at tax sale for the delinquent taxes for the year 1871. The land was redeemed from the sale by Julius A. Kuck, on the 6th day of October, 1874.

This action was brought against the defendant, who is treasurer of Warren county, to set aside the redemption which it is alleged was improperly made, and to compel the defendant to make a tax deed to plaintiff for said land.

The answer denies that plaintiff is entitled to a deed, because the land was redeemed from the sale.

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State v. Archer.

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The cause was tried by the court. The petition was dismissed. Plaintiff appeals.

*Todhunter & Hartman*, for appellant.

*Henderson & Berry*, for appellee.

ROTHROCK, CH. J.—This action cannot be maintained. That a redemption was in fact made is not questioned. Section 891 of the Code provides: "The county auditor shall, upon application of any party to redeem any real property, \* \* \* and being satisfied that such party has a right to redeem the same, and upon the payment of the proper amount, issue to such party a certificate of redemption \* \* \* \* \*"

It does not appear what showing of a right to redeem was made by Kuck to the auditor. It must, therefore, be presumed that it was sufficient. The treasurer has no power or authority to question the act of the auditor, and make a deed regardless of the redemption, and Julius A. Kuck's right to redeem cannot be determined in an action against the treasurer.

An adjudication against the treasurer would leave the rights of the redemptioner the same as if no adjudication had been had.

**AFFIRMED.**

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#### THE STATE V. ARCHER.

1. Practice: CONTEMPT. A witness who is in contempt may be arrested upon a warrant directing the arrest in vacation, but the court may also order his discharge by the officers intrusted with the writ, upon bail fixed by the court. These proceedings, however, are authorized only in a case of actual contempt, and when necessary to the proper administration of justice.

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State v. Archer.

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*Appeal from Montgomery District Court.*

FRIDAY, APRIL 19.

THE abstract presents the facts of the case in the following language:

"At the term of the District Court of said county, in November, 1877, there was pending the case of the *State of Iowa v. Wm. & S. E. Newton*, on indictment charging said defendants with the crime of keeping a nuisance; that the name of appellee herein was on the back of said indictment, indorsed as a witness before the grand jury, and was the only name so indorsed, and the only witness the State had; that during term time, to-wit: November 14th, defendant herein was duly and legally subpoenaed, in said county, to appear and testify in said case; that November 15th said case was called for trial, and appellee duly called as a witness, but made no answer, and did not appear, whereupon the district attorney asked for an attachment against appellee, that he might be dealt with as for a contempt, which writ was accordingly issued, and said case continued for the term. Afterwards, on the — day of November, 1877, it being the last day of said term of court, said court being about to adjourn until court in course, and the sheriff and his deputies not being able to find appellee, nor make his arrest by virtue of said writ, the district attorney asked that an order might be issued directing the sheriff to arrest him, though it be in vacation, wherever found in said county, and that, if arrested, that appellee might be admitted to bail, in responsible sum, requiring him to appear at the next term, to answer of said contempt, all of which the court refused, and discharged said attachment, to which rulings, on said day, the district attorney then and there excepted."

The State appeals.

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State v. Archer.

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*Smith McPherson, District Attorney, for the State.*

No appearance for the appellee.

BECK, J.—I. The witness, being in contempt, could have been brought before the court upon a warrant returnable at a given day. Code, § 3496. There is no reason why this day

1. PRACTICE:  
contempt.

may not be of a subsequent term of the court, if the administration of justice requires it. If the case so requires, the error may be made at any time. But the court, in view of such an arrest before the return day, in favor of the prisoner, may direct his discharge upon bail to be fixed by the court. The officer serving the warrant would be authorized to discharge the prisoner upon his giving bail in the required amount. Code, § 4217.

These proceedings must only be had upon an actual contempt, and it must appear that the proper administration of justice demands it, as in a case where the witness cannot be arrested at all, except upon a warrant which may be served in vacation. The issuing of such a writ rests in the discretion of the judge, to be exercised in accord with the law. If the discretion is abused, it is error which the court will correct.

II. The record does not show that the discretion to be exercised in such case was abused by the court below. We will presume that the court has acted rightly until its action has been made to appear erroneous. We will presume that, for some good reason, the court below refused to issue the writ, as that the necessity for the writ was not made to appear, or that the witness could be arrested at the next term of court, or other matters of this character.

The judgment of the court below is

**AFFIRMED.**

HERVEY V. SAVERY ET AL.

1. **Equitable Jurisdiction: MISTAKE.** Equity will not interfere to correct the terms of an instrument in writing on the ground of mistake, unless the fact of the mistake be established beyond a reasonable doubt.
2. **Mortgage: RELEASE.** The release by the mortgagee of his interest acquired by foreclosure and sale, after a junior mortgagee has set up his right to redeem, will not have the effect to defeat such right.
3. **—: PARTY.** One to whom the senior mortgagee may have conveyed his interest, acquired by the foreclosure and sale, is not a necessary party to the proceeding to enforce the right of redemption, provided such conveyance be made pending the proceeding.
4. **Pleading: ANSWER: WAIVER OF.** The failure to answer a cross-petition cannot be taken advantage of on appeal, when the party filing it, instead of asking for a default, proceeds with the trial as though in fact the pleading had been answered.

*Appeal from Polk Circuit Court.*

FRIDAY, APRIL 19.

THIS was an action to foreclose a mortgage. A decree was rendered for plaintiff, under which the lands were sold upon execution to plaintiff. The Charter Oak Life Insurance Company was a defendant, and a decree by default was rendered against it; subsequently, upon its petition, the decree as to it was set aside, and a hearing awarded, whereupon the court held, and so decreed, that it had the right, as a junior mortgagee, to redeem the lands sold within a time prescribed. Before the expiration of the time for redemption, as fixed by the decree, the insurance company filed its petition for a modification of the decree allowing it to redeem, by correcting an alleged mistake therein, whereby part of the land was omitted, which it has the right to redeem: but the right, on account of the mistake, is not secured by the decree. Upon the final

48	313
80	753
48	313
87	330
87	684
48	313
80	44
48	313
94	406
48	313
96	329
48	313
98	345
48	313
102	126
48	313
115	684

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*Hervey v. Savery.*

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hearing of the case made by this petition, the relief therein prayed for was granted, and the correction of the former decree was made. The plaintiff, F. G. Hervey, and defendant J. C. Savery, appeal. The facts of the case fully appear in the opinion.

*Hubbard, Clark & Deacon*, for appellants.

*Nourse, Kauffman & Co.*, for appellee.

BECK, J.—I. The facts necessary to a clear understanding of this case are as follows: In 1861, Safford Savery executed to Madison Young a mortgage upon two adjacent tracts of land, one of twenty acres, the other of thirteen and one-quarter acres, securing purchase money of the property to become due in seven years. By a stipulation in the mortgage, Savery was not to be personally liable for the debt, the creditor remedy being limited to foreclosure and sale of the land. In 1864, Safford Savery conveyed the land to James C. Savery. In consideration of an extension of time granted by Young, James C. Savery guaranteed the payment of the debt, and executed another mortgage upon the same property described in the first mortgage executed by Safford Savery, with a covenant binding the mortgagor not to set up, in defense of a foreclosure suit, any conveyance made to him by any other person for any part of said land.

P. M. Casady, administrator of the estate of Madison Young, instituted proceedings to foreclose this mortgage December 24, 1874. Savery and wife and others, who need not be named here, were made defendants. This is the action in which the controversy arises which is before us for determination. By an amendment of the petition, it is shown that plaintiff did not seek a foreclosure as to "the north half of lot seven of the Pursley estate, it being the tract of land now known as J. C. Savery's addition to the city of Des Moines, and being the same tract which Madison Young

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Hervey v. Savery,

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released from the mortgage set forth in the petition of plaintiff." No foreclosure and sale were sought against this land.

Casady, as administrator of the estate of Young, assigned the note and mortgage to plaintiff, F. G. Hervey, who was substituted as plaintiff in the place of Casady. After this substitution a supplemental petition was filed, making the Charter Oak Life Insurance Company a defendant and alleging that it held some lien or claim, which, however, was inferior to plaintiff's mortgage. Service by publication was had upon the insurance company, the notice alleging that foreclosure was asked upon the twenty-acre tract of land.

In due time a decree was rendered, foreclosing plaintiff's mortgage upon both tracts of land, without excepting therefrom any part of either. Upon this decree the lands were sold, *en masse*, under appraisement, for five thousand nine hundred and sixty dollars and thirty cents, to the plaintiff, F. G. Hervey.

Within the time allowed by law, the Charter Oak Life Insurance Company moved to set aside the decree on the ground that notice was served by publication only, and asked to be permitted to appear and defend in the action. The motion was sustained, and thereupon the insurance company filed its answer setting up that it was the holder of a mortgage executed by James C. Savery, after the execution of plaintiff's mortgage upon the twenty-acre tract of land covered by plaintiff's mortgage, as well as upon other real estate, to secure the payment of fifty-seven thousand four hundred and thirty dollars. The answer alleges that the assignment of the mortgage by Casady to Hervey was colorable only, being for Savery's benefit. Upon a trial of the issue presented in this answer the court found, and so decreed, that the insurance company had the right to redeem the twenty acre tract from plaintiff as held by him under his purchase at the sheriff's sale. A time was fixed by the decree within which the redemption should be made. Before the expiration



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Hervey v. Savery.

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of this time the insurance company filed a petition asking for a modification of the decree, so as to extend its right of redemption to the other tract of land covered by plaintiff's mortgage, and included in the decree and sale to him.

Hervey answered this petition, alleging that the thirteen-acre tract had been wholly released by Madison Young, in his life-time, from the lien of his mortgage, and that it was included in the decree through mistake, and through a like mistake sold upon the execution; that the provision of the decree allowing the insurance company to redeem, which limits that right to the twenty-acre tract, was not made through mistake, but was entered with the knowledge and consent of the company's attorneys. He shows that after the decree allowing the insurance company to redeem, and before its petition asking a modification thereof was filed, he had sold and conveyed the twenty-acre tract, and, subsequently to the filing of the last-named petition, he had released to J. C. Savery all his interest in the thirteen-acre tract.

Savery filed an answer and cross-bill, in which he alleges that he paid to Young, in his life-time, a part of the debt secured by plaintiff's mortgage, and Young then agreed to release from the lien all of the thirteen-acre tract; that the release executed by Young, through mistake, discharges the north half, and no more; that Hervey had notice of the true intention of the parties to the release, and the insurance company had knowledge of the fact when the decree in its favor was rendered. He prays that the release may be corrected so as to conform to the facts and intention of the parties. By an amended petition he shows that, prior to the rendition of the decree in favor of Hervey, he had sold and conveyed all of the thirteen-acre tract to divers persons, but does not name them.

The cause was submitted to the court below upon written testimony. It is triable here *de novo*.

The Circuit Court found that the release executed by Young

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Hervey v. Savery.

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covered but a part of the thirteen-acre tract, and that the insurance company was authorized to redeem the other part, and so decreed. Other provisions of the decree will be hereafter stated.

II. In our opinion, the insurance company is entitled to have the correction of the decree as sought by it, unless it be found that the land in question was intended to be released by Young, and the release did not so provide through mistake.

Hervey had a mortgage upon two tracts of land, one of which was covered by the mortgage of the insurance company. He subjected both tracts to his lien, and purchased upon the foreclosure decree and execution. The insurance company may be substituted to the rights of Hervey, and take his place. See 1 Story Equity Jurisprudence, § 633, and notes. This rule of equity is admitted by counsel for appellants. Applying this doctrine to the case before us, we must hold that, in equity, the insurance company is entitled to take the place of Hervey, as to the thirteen-acre tract as well as to the other, unless Hervey's rights thereto were cut off by the release pleaded, or in some other way.

We must first here give further attention to the facts which are specially involved in the question of mistake in the release.

The thirteen-acre tract of land is designated in the testimony as lot 7 of the Pursley estate, and was made by Savery  
1. EQUITABLE jurisdiction: mistake. an addition to the city of Des Moines, being subdivided into lots. A street was laid off nearly through the middle of it, running east and west. The tract north of this street is marked "A," (block "A,") and is subdivided into twenty lots. An alley runs through the center, parallel with the street. Along the street on the south another block is laid off into ten lots, and is marked "B." The south part of the tract is not subdivided into lots; it is somewhat less than half of the whole tract, and is designated as "lot C" upon the plat. Two creeks, brooks, or streams are traced upon the map as running through it, and uniting near its south line.

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Hervey v. Savery.

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The release executed by Young is as follows: "I hereby release, for a valuable consideration, the north half of lot No. 7 of the Pursley estate from a certain mortgage, executed on the 2d day of March, 1861, to me, for five thousand dollars, by Safford Savery, and also from a mortgage executed the 5th of March, A. D. 1868, by James C. Savery, to me, to secure the payment of the above five thousand dollars. The whole of said lot No. 7 contains thirteen acres and eight-one-hundredths of an acre; it being in the south-east quarter of section 5, in township No. 78 north, of range 24 west; said north part of lot 7 being the same that James C. Savery has laid out into city lots.

*"April 4, 1872.*

MADISON YOUNG."

Appellants claim that the release, so far as it is limited to a part of the tract, is the result of a mistake on the part of Young, who wrote it. The testimony in support of this position is meager and indefinite. One witness testifies that he was present when Savery informed Young that he "had plat-  
ted and laid off" the tract, and was anxious to dispose of the lots, and the mortgage was an obstacle to the sale; he therefore wished to pay it off. Young did not want all of the money, but proposed that he would accept a part, and would release the tract from the lien of the mortgage. This was finally agreed upon, and Savery paid one thousand dollars. The release was afterward brought to the witness, who, acting for Savery, caused it to be filed for record without reading it. The testimony of another witness is to the effect that he had an impression, gathered from conversations with Young, that the mortgage was a lien upon the twenty-acre tract and no more.

There is no testimony to authorize the conclusion that Young did not express his exact intention in the release, or that he made any mistake at all, and we cannot conclude that such intention was not in harmony with the final agreement

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 Hervey v. Savery.
 

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between him and Savery. We must presume it was, and the contrary must be shown in order to authorize us to conclude he made a mistake in preparing the instrument. Savery and he may have modified the agreement testified to by the witness in a subsequent arrangement. This we would presume, rather than adopt the conclusion that this was a mistake. But it by no means appears that the release does not express the understanding that Young had of the agreement testified to by the witness. Savery desired to sell the lots which he had laid off. The south part of the tract, marked "C," contains several acres; the other part is divided into lots suitable for dwellings. It is highly probable that Young and Savery both understood the agreement to contemplate the release of these lots, and not the land "C," not laid off into lots. There are other reasons which we could mention warranting the conclusion that there was, in fact, no mistake in the release. But we are not required to find that there was no mistake, in order to uphold the release. Unless a mistake is shown by sufficient proof, the instrument will be regarded as valid in its present form. In our opinion the testimony is not sufficiently clear and satisfactory to authorize us to reform the instrument on the ground of mistake. The proof should clearly make out the mistake, and should "strike all minds as being unquestionable and free from reasonable doubt." 1 Story's Eq. Jurisp., § 157; *Gelpcke, Winslow & Co. v. Blake*, 15 Iowa, 387. In our opinion it is far short of these requirements.

III. The testimony, it is claimed by appellants, shows that Hervey acquired the mortgage with the knowledge that the release covered the whole thirteen-acre tract.

2. MORTGAGE:  
release.

The evidence, it may be admitted, is to the effect that Savery so informed Hervey, or his agent, when the mortgage was assigned to him. Hervey unites with Savery in claiming that all the tract was released. But this claim, singularly enough, is only made after the insurance company

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Hervey v. Savery.

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comes in to redeem. The decree covered the whole tract. The whole tract was sold on the execution, was purchased by Hervey, and, a year having nearly expired, the insurance company appeared in the case and was in due time, by decree of the court, permitted to redeem the twenty-acre tract. But the insurance company discovered that it had the right to redeem the thirteen-acre tract also, and again appears in court and asks that such right be enforced. Then the plaintiff and defendants in the case discover that plaintiff had no right whatever to a lien on any part of the thirteen-acre tract, and that the mortgage was acquired by him with full notice thereof. He thereupon releases his rights acquired by the foreclosure and sale by quitclaim deeds to Savery and his grantees. These deeds, it must be observed, were executed nearly two years after the decree and foreclosure, and plaintiff's purchase upon execution, and not until after the insurance company had set up their right to redeem. It must be remarked, too, that this was all done after Hervey had become fully secured in the recovery of his debt by the purchase of the land, which he could hold until redemption was made by the payment of the full amount of his claim. Under all these circumstances, a court of equity will not, upon testimony showing this agreement of these parties, defeat the right of another based upon the record made by the parties themselves, which is inconsistent with the harmony now prevailing between them.

But if Savery did give notice to Hervey that the release covered the whole tract, it was not in accord with the fact, for, as we have seen, it related to a part only, and there is no ground upon which it can be reformed or changed.

We conclude, therefore, that Hervey did have a right to enforce his lien upon the thirteen-acre tract; having done so, the insurance company may take his place.

The decree of the court below finds that lot "C" of the tract in question, as above explained, is not covered by the

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Hervey v. Savery.

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release. We think the conclusion correct. It is quite clear that the release does not cover that lot; it is not necessary to inquire whether other lots are not covered by it, as the insurance company does not insist that any other part than lot "C" is outside of the release.

IV. It is insisted that the insurance company is not entitled to the relief asked for in its petition last filed, because there was no mistake in the decree first rendered in its favor. The truth is, the decree granted it all the relief prayed for in its petition. But all the relief to which it was entitled was not prayed for, through a mistake. The last petition is in the nature of a supplemental petition, asking full relief on the ground that it was not sought in the first through oversight. We think the testimony shows that there was no negligence, or any act, on the part of the insurance company, which would deprive them of the right to seek relief in the supplemental petition. We shall hereafter see that no right had accrued which would have that effect.

V. The testimony shows that, after the last petition of the insurance company was filed, plaintiff, F. G. Hervey, conveyed the twenty-acre tract to James F. Hervey. It is claimed that he is a necessary party, and the insurance company can have no relief until he be brought in. He acquired his interest, if he have any, after this proceeding was instituted, and will be bound by the proceeding against his grantors as though he was himself a party.

VI. After the foreclosure proceedings were commenced, Savery conveyed lot "C" to Bangs, who, after the first decree was rendered, conveyed to Helen E. Benedict the same property. Subsequently to the filing of the insurance company's last petition, Hervey released to her this lot by quitclaim deed.

It is insisted that Benedict is a necessary party. She is in the like condition of James F. Hervey, having acquired her interest from one who took it from Savery, after the suit was

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 Hervey v. Savery.
 

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brought. When she acquired her interest, the decree stood against the land, and it is not claimed that she acquired the property supposing it had been released. She had notice by the record of the suit and of the mortgage held by the insurance company, and she was bound to take notice of all rights held under that mortgage. The subsequent proceedings, which are the subjects considered in this appeal, are incidents growing out of the foreclosure, which she is presumed to have contemplated when she accepted the deed to herself.

VII. The decree of the court below contains a provision intended to protect the rights of James F. Hervey and Mrs. Benedict, by requiring them to be notified to appear and show cause why the money paid to redeem the land by the insurance company should not be paid to F. G. Hervey, and the money to be retained for further order of the court, unless James F. Hervey and Mrs. Benedict release all interest they have in the land. This provision is made the ground of objections. We will not inquire whether it ought to have been made. F. G. Hervey cannot object, for he has transferred his interest in the lands, as is established by the testimony. Mrs. Benedict and J. F. Hervey cannot complain, for it is intended to protect them; the insurance company does not object, and Savery cannot, for it is a matter in which he has no interest. The rights of parties interested in the subject-matter of the action may be protected by the provision. We will, therefore, let it stand.

VIII. The appellants insist that the relief prayed for by Savery in his cross-petition, namely, the reformation of the release executed by Young, must be allowed, because the insurance company did not reply to the cross-petition, the allegations of which must be, therefore, admitted. Counsel for the insurance company insist that the pleading of Savery cannot be regarded as a cross-petition for several reasons, which need not be here stated. We do not concur with them. We think, however, that we must presume

4. PLEADING:  
ANSWER:  
waiver of.

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Hervey v. Savery.

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an answer to the cross-petition was filed by the insurance company. The appellants in the court below did not claim that the pleading had not been answered. They introduced testimony to support the pleading in question, just as though it had been denied, and conducted the case there and here in precisely the same manner they would have proceeded had an issue been taken upon the cross-petition. Good practice demanded that they should have taken a default upon the cross-petition, if it had not been answered, thus relieving the court below and this court of the labor of examining testimony which, under the law, was not needed, if there had been no reply, to support the right to the relief claimed by the pleadings. They have acted in the management of the case as though an answer had been filed to the cross-petition; the other parties and the court have met them with like action. Good conscience and fair practice demand that they shall not now be heard to urge as an objection the want of a pleading which, by their acts, they have all through the progress of the case admitted was on file. We must presume that there was filed at the proper time a reply to the cross-petition. Any other conclusion would lead to the grossest injustice.

No other questions demand attention. The decree of the Circuit Court is

**AFFIRMED.**



48	324
84	400
48	324
86	31
48	324
97	506
101	581
48	324
108	482
48	324
114	108
114	732

IN THE MATTER OF THE APPEAL OF THE DES MOINES WATER  
COMPANY.

1. **Taxation : CORPORATION : MUNICIPAL CORPORATION.** A water company, which supplies the city with water, whose rates are regulated by the city council, and which, by the terms of the ordinance conferring its powers, may be purchased at a fixed price by the city, is, nevertheless, a private corporation, and its property is subject to taxation.
2. ——— : ——— : **EXTINCTION OF FIRES.** Nor is its property exempt from taxation by section 797 of the Code, since its primary and exclusive use is not for the extinction of fires.
3. ——— : ——— : **ASSESSMENT.** The real and personal property of such a corporation may be assessed to the company, and must be so assessed when the shares of the company have not been otherwise assessed.
4. ——— : ——— : ———. The land, buildings, machinery and water mains are all real estate, and the mains are subject to assessment in the township where the machinery which propels the water through them is situated.
5. ——— : **EQUALIZATION : APPEAL.** Where an appeal is taken by the tax-payer from an assessment fixed by the board of equalization, the amount of the assessment cannot be raised by the court to which the appeal is taken.
6. ——— : **ASSESSMENT : STATUTE.** The statute authorizes the assessment of the property of corporations the same as that of individuals, and also the assessment of the shares of stock to the individual owners, and taxation under either method is legal.

*Appeal from Polk Circuit Court.*

FRIDAY, APRIL 19.

THE Des Moines Water Company was incorporated in 1871. The general nature of its business, as set forth in the articles of incorporation, is "the construction of water works, and the operation and use of the same, for the purpose of supplying the city of Des Moines and its citizens with water. \* \* \*"

By an ordinance of the city council the water company was empowered to build, maintain and operate water works in said city, to supply said city and its inhabitants with pure

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Appeal of the Des Moines Water Company.

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and wholesome filtered water, and to use streets, alleys and avenues of said city for laying pipes. Said ordinance further provides that said company shall adopt the system known as Holly Water-works, and maintain the same in such condition as to be capable, at all times, of throwing six streams at once, one hundred feet vertically, through a one-inch nozzle, and said company shall erect, for fire purposes, as many hydrants as the city council shall, from time to time, direct, and the city shall pay said company the actual cost of such hydrants, which shall be under the control of the city council, and the fire department appointed by it.

And the said company shall furnish to said city, from such hydrants, all the water necessary for washing, cleaning, cooling, sprinkling and draining the streets and alleys, avenues, gutters, sidewalks, sewers and public grounds, not to exceed, however, the rate of one hundred thousand gallons daily for each ten thousand in population, and the city may attach to each of such hydrants a faucet, from which water may be drawn by citizens or passers-by, for the purpose of drinking, for persons and animals.

The said company shall, within eighteen months, have at least ten miles of pipe laid down and connected with the works, and shall furnish to the city authorities and the citizens upon the several streets, avenues and public grounds along which their pipes may be laid, such quantity of water as they may desire, and shall have the right to charge the citizens thereof, for such water as may be supplied them, as much and no more than the average price paid therefor in other cities of the United States having efficient water-works, operated by private companies. The city shall pay to said company for the use of the city hydrants, and water therefrom, the yearly rent of two thousand dollars per mile for the first five miles of water mains laid, and fifteen hundred dollars for the second five miles so laid, and for each additional mile such sum as may be agreed upon, and in case of disagreement the price to be fixed by arbitration.

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Appeal of the Des Moines Water Company.

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At any time after six months from the date of the ordinance, on giving six months' notice to the president and directors of said water company, the city authorities shall have the right to purchase said water-works, together with all land, fixtures and appurtenances, by paying to said company the amount actually expended in the construction of the works, and the purchase of their grounds necessary for the use thereof, and in case the net receipts from such works shall not amount to ten per cent per annum on the actual cost thereof, then the city shall pay in addition to the cost aforesaid such further sum as, when added to the net receipts of said company, shall be equal to ten per cent on the cost aforesaid.

No city taxes shall be levied or collected on the works of the company, or on the stock issued thereby, or capital necessarily invested and employed in constructing and operating the same, for two years from the date of the ordinance.

On the 9th day of May, 1871, the said company accepted the rights, privileges, franchises and duties granted to and conferred upon it by said ordinance.

The capital stock authorized by said company is three hundred thousand dollars, and is represented by shares of one hundred dollars each, all of which was subscribed for prior to the year 1875, and owned by various persons, who had paid assessments thereon of twenty per cent. Said company borrowed, prior to 1875, two hundred thousand dollars for the completion of said works, and executed deeds of trust on all of its property to secure the same, and such debt is still unpaid, except the interest. The city owned no part of the capital stock, and had no interest in the property of the company, other than is set forth in the ordinance granting said company the right to construct said works. Said company erected its water-works in the years 1871 and 1872, and have since maintained and operated the same, and have furnished to said city water for extinguishing fires, and for other purposes under the contract contained in said ordinance and its acceptance. In extinguishing fires in the city, the firemen attach their hose

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Appeal of the Des Moines Water Company.

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directly to the company's pipes, and the water is forced through the same on the fire by the direct action of the company's engines and pumps.

The property of said company consists of eight lots in the city, upon which are located the engines, pumps, boiler rooms, and machinery; and the water-mains or pipes, which are laid down in the streets and attached to the engines and pumps situated upon said lots. All of said property, with the appurtenances, is and was necessary for the successful operation of said water-works.

On the 1st day of January, 1875, said company had more than ten miles of water-mains laid in the streets of the city and attached to its works. For the use of such mains by the city, payment has been made to the company from time to time, as provided in said ordinance. Said company has, from the beginning, furnished water to private consumers for the pecuniary compensations agreed upon between it and the city and the said consumers, and it furnishes no water to either the city or private consumers except for a consideration. The city of Des Moines has never elected to purchase said works as provided in said ordinance. The said city is composed of two townships, Des Moines and Lee, the boundaries of which are co-extensive with the boundary lines of the city. The lots of the water company, and about seven miles of the mains, are situated in Des Moines township, and the remainder in Lee township, and water is furnished to the city for fire and other purposes in both townships as required by the city.

H. H. Rich was elected city assessor for the year 1875. He resided in Lee township and within the city. He assessed the said eight city lots, water-works, and property as the property of the Des Moines Water-Works Company, at the sum of two hundred thousand dollars. There was no other assessment or levy made upon the property of the water company for the year 1875, and no assessment of the stock of said company, nor any part thereof, against the company, the stockholders, or any other person.

## Appeal of the Des Moines Water Company.

The company appeared before the city council, acting as a board of equalization, and filed a petition for the cancellation and correction of the assessment.

After hearing the evidence offered and considering the same, the city council reduced the said assessment to fifteen thousand dollars, and certified the same to the board of supervisors, as required by law.

The water company appealed to the Circuit Court. Upon a hearing said court increased the assessment to sixty thousand dollars. From this order the water company appeals.

*J. S. Polk*, for appellant.

*Smith & Baylies*, for appellees.

ROTHROCK, CH. J.—I. There are no disputed facts in the case. It was submitted in the court below upon the articles of incorporation of appellant, the ordinance of the city, and an agreed statement of facts. To the end that the case may be disposed of as briefly as possible, consistent with an intelligent understanding of the facts, we have not set out the record in full, but have given the substance, so far as necessary to a fair understanding of the questions involved.

It is first insisted by appellant that its property is exempt from taxation, because it is devoted to a public use; the city council having control over the rates the company may charge the public for water, and having, by its ordinance, reserved the right in the city to purchase the property at a price equal to its cost, and ten per cent per annum interest thereon. This view we do not believe to be correct. An examination of the articles of incorporation, and the ordinances of the city, clearly demonstrates that appellant is a private incorporation for pecuniary profit, and the use of water furnished by it to the city and its citizens does not render its land, engines, pumps, machinery, mains and appurtenances public property. The same argument would exempt from taxation the property of omnibus lines, whose rates of

1. TAXATION:  
corporation:  
municipal  
corporation.

## Appeal of the Des Moines Water Company.

fare and mode of doing business are controlled by the ordinances of the city. The property is no more devoted to a public use in one case than the other. The fact that the city is furnished water, for which it pays what is presumed to be a fair consideration, does not change the property from a private to a public use. The reservation by the city of the right to purchase the works does not invest it with any title or right to the property, or in any sense make it public property, until it shall elect to purchase. It is not an executory contract that the company can enforce by an action for specific performance, nor can it recover damages for its breach.

II. It is next claimed that the property is exempt from taxation by section 797 of the Code, which exempts "the property of 2. —: —: the United States, and of this State, including agricultural college and school lands, and all property leased to the State; the property of a county, township, city, incorporated town or school district, when devoted entirely to the public use, and not held for pecuniary profit; public grounds, including all places for the burial of the dead; *fire engines, and all implements for extinguishing fires, with the grounds used exclusively for their buildings and the meetings of the fire companies.* \* \* \* \* \*

Conceding that by this section fire engines, and all implements for extinguishing fires, with the grounds used for their buildings, etc., are exempt, whether owned by a city or town, or by an incorporated company or an individual (but which we do not determine), still we think the works of appellant are not a fire engine within the meaning of the statute. A fire engine is an engine the primary purpose of which is to extinguish fires. The water-works are a great force pump which supplies the city and its inhabitants with water for all purposes to which it may be applied. The force is constantly applied for ordinary use, and for occasional use in times of fire.

III. Again it is contended that "if the water-works are

## Appeal of the Des Moines Water Company.

3. —: —: subject to taxation, its property, both real and assessment. personal, all of which is represented by its capital stock, should be assessed to its stockholders."

Sections 797, 798, 799 and 800 of the Code provide that certain property therein described shall be exempt from taxation. The property owned by corporations is not included in such exemptions. Section 801 provides: "All other property, real or personal, is subject to taxation in the manner directed." Section 807 provides that the property of insurance companies shall be taxed upon its gross premiums.

Section 810 directs that property of railroad companies shall be taxed upon an assessment made by the executive council. Other sections prescribe the method of taxing shares of stock in national banks, and the property of express and telegraph companies.

Section 813 provides that depreciated bank notes and the stock of corporations and companies shall be assessed at their cash value.

Section 821 classifies "stocks or shares in any corporation or company not required by law to be otherwise listed and taxed," as personal property.

Section 823 provides: "The assessor shall list every person in his township and assess all the property, personal and real, therein, *except such as is heretofore specifically exempted*  
\* \* \* \* \*"

It is argued that as section 813 directs that the stock of corporations and companies shall be assessed at its cash value, no assessment can be made upon the property of the corporation, because this is the manner directed for the taxation of the property of corporations, when no other mode is provided.

This, in our opinion, would be correct, if it were not for the requirement of section 823, that all property, real and personal, must be assessed, excepting such as is specifically exempted. This requires that the real property of corpora-

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Appeal of the Des Moines Water Company.

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tions, of the character of appellant, must be assessed, and the requirement is made in as plain terms as if it were so expressly declared. We cannot be aided in the construction of this statute by the cases cited by counsel for appellant, because no one of them construes a statute like this. We are not unmindful, either, of the rule so well stated in *Cooley on Taxation*, 165, that "when it is once decided that any kind or class of property is liable to be taxed under one provision of the statute, it has been held to follow as a legal conclusion that the legislature could not have intended the same property should be subject to another tax, though there may be general words in the law which would seem to imply that it may be taxed a second time."

The shares of the stockholders of the water company have not been assessed. Whether they can be under a proper construction of the statute, and whether that would be double taxation, we do not determine; but we are united in the belief that the statute plainly and clearly makes the property of the corporation taxable. The rule is that all property is taxable, and no exceptions are allowed except such as come within the specific exemption provided by statute.

IV. We think the land, building, machinery and water-mains are all real estate, and though the whole length of the mains  
1. —: —: are not laid upon the lots owned by appellant, and  
—: —: extend from Des Moines into Lee township, yet they are appurtenant to the water-works or main structure. The argument that if the mains are real estate, that part which is laid in Lee township should have been there assessed the same as any other real estate, is answered by the fact that their mains acquire their real estate character by being appurtenant to the water-works, and in a conveyance of the works would pass as incident to the principal thing, without any conveyance of the land where they are located. Under such circumstances no assessment need be made except in the place where the water-works and lots are situated.



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Appeal of the Des Moines Water Company.

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V. Lastly, it is contended "that the Circuit Court erred in raising the assessment of said water-works from fifteen thousand to sixty thousand dollars."

The Code, § 831, provides: "That any person who may feel aggrieved at anything in the assessment of his property, §. ———:  
equalization:  
appeal. may appear before said board of equalization, in person or by agent, at the time and place mentioned in the preceding section, and have the same corrected in such manner as to said board may seem just and equitable, and the assessor shall meet with said board and correct the assessment books as they may direct. Appeals may be taken from all boards of equalization to the Circuit Court of the county where the assessment is made."

The person aggrieved at the assessment of his property may appear and have the assessment corrected. No one has the right to appear before the board of equalization as a party to a proceeding, and have another's assessment corrected or raised. Whether the city or township has the right to appeal from the action of the board of equalization we need not determine. It would seem to be a novel proceeding to allow the same authority which equalizes the assessment to appeal from its own order. However that may be, no appeal was taken by the city in this case. We think, when this appeal was presented to the Circuit Court, the only question to be determined was whether the water-works company had just cause to complain. If it had not, that was the end of the inquiry.

We are reminded by counsel for appellee that in ordinary appeals from justices of the peace the judgment against an appellant may be increased. But this is by virtue of the statute, which provides that in such cases an appeal brings up a cause for trial on the merits and for no other purpose, and that any person aggrieved may appeal from the judgment of a justice. Code, §§ 3575, 3590. The order, so far as it increases the assessment, will be reversed, and, as the cause was submitted upon an agreed statement of facts in

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Appeal of the Des Moines Water Company.

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the court below, an order will be made here fixing the value of the property of appellant at fifteen thousand dollars.

REVERSED.

ON REHEARING.

SEEVERS, J.—A rehearing was granted on the petition of the water company, on the alleged ground it had not been expressly determined in the foregoing opinion that the property of corporations organized for pecuniary profit could only be taxed through the shares. This question will now be considered.

The Constitution provides that "the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals." Article 8, § 2.

The statute, so to speak, reiterates this constitutional injunction, and there is no doubt but that the statute, as well as the Constitution, declares in emphatic terms that the property of corporations shall be taxed.

It is equally clear the statute provides that the stock of such corporations shall be assessed at its cash value. When  
 §. ———: assessed and taxed under this statute the stock  
 assessment: must be taxed as the property of the respective  
 statute. owners, and there is no provision making the corporation liable therefor. Whether the statute in express terms declares that both the shares and corporate property shall be taxed we are not called on to determine.

The manner of assessing and taxing corporate property differs, as well it may, in the several States. In some only the stock is taxed. Cooley on Taxation, 273. We have, then, the case where the statute provides that both the shares and property may be taxed. It is our duty to declare both of these statutes valid, if such can be done. Both are equally obligatory, and on precisely the same footing. Neither should be ignored or declared void, unless it is absolutely required by reason of some constitutional provision making it our duty

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King v. Stewart.

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to so declare. We do not understand it to be claimed there is any such constitutional provision.

That it would be competent for the General Assembly to adopt either of these modes of taxation must, we think, be conceded. But it has provided that both may be used in the same statute. Why or by what authority can one be selected and declared in force, and the other not? We think the only construction that can be adopted is that both are in force, and an assessment and taxation under either is valid; that is to say, the property may be taxed to the corporation, or the shares to the owners. Whether both may be taxed at the same time we are not called on to determine.

The former opinion is adhered to.

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KING v. STEWART.

48	334
87	66
48	334
101	913
48	334
103	565
48	334
126	671

1. **Practice: OPENING DEFAULT AFFIDAVIT OF MERITS.** Upon an application to open a default, an affidavit alleging that the defendant has a "good and substantial defense upon the merits" is not sufficient. The affidavit should state the facts constituting the defense.
2. ———: ———: **ANSWER.** Unless the affidavit sets out the facts constituting the defense, it is not error to refuse to grant the application and permit an answer to be filed.

*Appeal from Humboldt Circuit Court.*

FRIDAY, APRIL 19.

THE petition in this case was filed on the 8th day of December, 1875. Service of the original notice was made upon the defendant in Polk county, on the day following, requiring him to appear and defend before noon of the first day of the next February Term of said court.

The action was in equity to quiet plaintiff's alleged title to certain real estate.

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King v. Stewart.

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The defendant did not appear on the first day of the term. On the second day a default was entered and a decree rendered as prayed for in plaintiff's petition. In the forenoon of the same day, defendant appeared by counsel and filed a motion to open the default and decree, and permit defendant to answer, which was submitted to the court, and overruled. Defendant appeals.

*Theodore Hawley*, for appellant.

*Doud & Clarke*, for appellee.

ROTHROCK, CH. J.—I. It is first urged that "the court erred in granting a default and rendering judgment against defendant before the afternoon of the second day of said term of court."

Section 180 of the Code provides that judges of the District and Circuit Courts may provide by general rule "that the time of filing pleadings or motions shall be other than provided by this Code."

It appears from the argument of appellant's counsel that in the order fixing the times of holding the courts in the district, it was directed, in all actions in both courts, the defendants were required to move, demur, or answer before noon of the first day of the term. It also appears from the additional abstract that this order was entered of record in the Circuit Court in March, 1875, said court then being in session.

It is objected that this is no such general rule as is contemplated by the section of the Code above cited, because it was never adopted and published as there required.

It is a sufficient answer to this objection to say that the record before us does not show that the question as to the validity of this rule or order was presented to the court below. It cannot, therefore, be urged here.

II. The affidavit presented with the motion to open the

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The Farmers' and Merchants' Bank of Lineville v. Wasson.

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1. **PRACTICE:** opening default: affidavit of merits. default, we think, sufficiently excused the failure of the defendant to appear and defend at the time named in the notice. But this is not all that is required. It must also be an affidavit of merits. Code, § 2871. The only statement of merits is in these words: "Defendant has a good and substantial defense to this cause upon the merits, as deponent verily believes, from an examination of the records, and facts of this case." This is but the statement of an opinion by affidavit. It should be a statement of facts, that the court may determine therefrom the question of merits.

III. The affidavit sets forth that the answer of defendant  
2. —: —: was prepared and ready to be filed if the default  
answer. should be opened, and the answer was tendered to the court, to be filed instanter.

It is urged that the court erred in not permitting the defendant to file his answer.

Defendant was not entitled to answer until it was adjudged that it was his right to have the default set aside. Then, as a condition, he must plead issuably and forthwith. Code, § 2871. It is not shown what the answer contained. Error must affirmatively appear. We cannot presume that the court abused its discretion in refusing to set aside the default.

**AFFIRMED.**

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THE FARMERS' & MERCHANTS' BANK OF LINEVILLE v. WASSON.

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1. **Corporation: STOCK: TRANSFER OF.** A by-law of a corporation which provides that transfers of stock shall not be valid unless approved by the board of directors, while it may be enforced as a reasonable regulation for the protection of the corporation against worthless stockholders, cannot be made available to defeat the rights of third persons.

2. —: —: **LIEN UPON.** In the absence of a contract or provisions of its charter or by-laws to that effect, a corporation has no lien upon its shares in the hands of a stockholder to secure indebtedness from the stockholder to the corporation.

48	336
97	210
48	336
126	82

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The Farmers' and Merchants' Bank of Lineville v. Wasson.

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3. —: BANK: DUTY OF OFFICER. The president of a bank, who was surety upon the note of a stockholder, took an assignment of the stock of the latter in the bank to secure himself against loss. The stockholder was at the time also a debtor of the bank and in failing circumstances: *Held*, that in the absence of fraud or concealment on the part of the president, there was nothing in the transaction inconsistent with the faithful performance of his duty as an officer of the bank, or that would give the bank a claim in equity to the benefit of the security.

*Appeal from Wayne Circuit Court.*

SATURDAY, APRIL 20.

THE plaintiff instituted an action at law against H. W. Wilson, and caused an attachment to issue therein, and process of garnishment to be served upon defendant, Wasson. The foundation of the action against Wilson was a promissory note given plaintiff for money borrowed and an account for an over-draft.

The defendant, in the proceedings of garnishment, is sought to be charged on account of certain stock of the bank owned by Wilson, as it is alleged, to which Wasson sets up a claim as the assignee thereof. The cause was finally regarded as a chancery proceeding and tried as such. By the final decree of the court it was held that the stock, fifty shares, claimed by the defendant, was held by him subject to the attachment and judgment of plaintiff, and judgment for the value thereof, three thousand three hundred and twenty-three dollars and ninety-five cents, was rendered against defendant. He appeals from the decree to this court.

*J. W. Freeland*, for appellant.

*Vermillion & Haynes*, for appellee.

BECK, J.—I. Reference need not be made to the form of the proceedings, or to the allegations of the pleadings. No objection is based upon such grounds. The case is submitted to

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The Farmers' and Merchants' Bank of Lineville v. Wasson.

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us as a proceeding in chancery, triable here *de novo*. We will so consider it.

The facts are not intricate, and are subject to but little, if any, dispute, and may be briefly stated as follows:

At the time the indebtedness accrued, which is the foundation of the action wherein the process of garnishment was issued, Wilson was a stockholder and director of plaintiff, and Wasson, the defendant, was, and continued to be at the time the process was served upon him, a stockholder of the bank, and president of its board of directors.

Wilson became indebted to the bank for money borrowed, and for over-drafts. Wasson became his surety upon a note to another for another sum borrowed, and was secured by an assignment of the bank stock in question, which, however, was not made as provided for by the by-laws of the bank. It became known that Wilson was in failing circumstances; thereupon defendant obtained from him a transfer of the fifty shares of stock in controversy, under an arrangement that defendant should pay the debt for which he was surety. The transfer was made by assignment of the receipts given for the payments made upon the stock, and also by the execution of a separate instrument in sufficient form. The transaction was had in the banking house, in the presence of the cashier, and a memorandum of the transfer was made upon the proper book of the bank. There is no testimony establishing fraud on the part of the defendant. He became surety for Wilson, so far as the facts appear in the record, in the regular course of business. He practiced no concealment or artifice upon the other officers of the bank in any of the transactions. The object he had in view in taking the stock as security, and in its final purchase, was to protect himself as surety of Wilson. His good faith is not impugned by the testimony before us.

The articles of incorporation of plaintiff provide that no transfer of stock is valid, except as between the parties, until

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The Farmers' and Merchants' Bank of Lineville v. Wasson.

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it is entered upon the books of the bank; and a by-law further declares that, until approved and accepted by the board of directors, it is invalid. The transfer, as we have stated, was entered upon the proper book of the bank, but the directors refused to approve and accept it. Their refusal was expressed after the transactions between defendant and Wilson, and after the assignment had been executed.

Upon the foregoing facts, we are to determine whether defendant acquired property in the stock of Wilson by the assignment, and whether the transactions are of such a character as to create a liability on his part for the value of the stock.

II. The articles of incorporation and by-laws declare that no valid transfer of stock can be made until it is entered upon

the books of the corporation. This restriction  
1. CORPORATION: stock: transfer of. accords with the law of the State. Code, § 1078.

But they also contain a further restriction, to the effect that the validity of a transfer depends upon the approval and acceptance of the board of directors of the bank.

These restrictions are intended for the benefit of the corporation, when its rights may be protected thereby, and to prevent the transfer of stock to irresponsible persons, which, if it should occur, would have the effect to impair the credit of the bank. The restriction first mentioned is necessary, in order that the officers of the corporation may know who are stockholders, which is essential in conducting elections of officers, and for other matters. It can never defeat the rights of other parties, and, in all cases, must be regarded as a reasonable requirement. This, if it were not—as it is—in accord with an express provision of the statute of the State, would demand that it be upheld by the courts.

But the same things are not true of the other restriction. While it may be lawfully enforced to protect rights of the corporation, it cannot, in other cases, be exercised without limitation so as to defeat the rights of others. If the corporation has no rights to be protected by its exercise, and other parties



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would be deprived of their property thereby, it cannot be enforced in such cases. Its enforcement would operate as an infringement upon the property rights of others, which the law will not permit. It would, besides, operate as a restraint upon the disposition of property in the stock of the corporation, in the nature of restraint of trade, which the courts will not tolerate. As the restriction is not imposed by express authority of the statute of the State, it cannot, in such cases, be enforced. These conclusions are supported by the following authorities: *Sargent v. Franklin Ins. Co.*, 8 Pick., 90; *Quiner v. Marblehead Ins. Co.*, 10 Mass., 476; *Angell & Ames on Corporations*, § 567; *United States v. Vaughan*, 3 Binn., 394; *Chambersburg Ins. Co. v. Smith*, 11 Pa. St., 120; *Chateau Springs Co. v. Harris*, 20 Mo., 382.

III. We will now inquire whether plaintiff had any right <sup>2. ———: ———:</sup> <sub>lien upon.</sub> to the stock in question, or lien thereon, which it was necessary to protect and enforce by the provision of the by-law forbidding transfer of the stock without the assent of its directors.

It is not claimed that plaintiff held any interest in or right to the stock, under any contract, prior to the proceedings of garnishment. In the absence of a contract, its relation to the stock is that of a stranger. The stock is the exclusive, absolute property of the stockholder, and is held by him free from any claim or right of the corporation, in the absence of contract or provisions of the charter or by-laws creating such claim or right, which have not been shown to exist in this case.

In the absence of contract and provisions of the charter or by-laws, a corporation has no implied lien upon the shares of a stockholder indebted to it, to secure such indebtedness. *Mass. Iron Co. v. Hooper*, 7 Cush., 183; *Sargent v. Franklin Ins. Co.*, 8 Pick., 90; *Heart v. State Bank*, 2 Dev. Eq., 111; *A. & A. on Corps.*, §§ 355, 569; *Dana v. Brown*, 1 J. J. Marsh., 304.

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IV. We discover nothing in the case which, in equity, gives plaintiff a right to the stock in controversy superior to  
 s. ———: defendant, in view of the official and fiduciary  
 bank : duty of officers. relation held by defendant as president of the bank. We have remarked that the transactions whereby defendant became bound as surety of Wilson, and the stock was assigned as security to defendant, and finally transferred in payment of Wilson's debt, exhibit no circumstances which justify the conclusion that defendant practiced any fraud or concealment whereby plaintiff was induced to give credit to Wilson, or to refrain from an attempt to seize the stock. Defendant in good faith became surety for Wilson. The case then stood in this way: Plaintiff and defendant were both creditors of Wilson. Defendant was an officer of plaintiff, but was not exclusively charged with the management of plaintiff's business. Indeed, it was principally conducted by the cashier, as to matters not controlled by the board of directors. The transfer of the stock to defendant was made with the knowledge of the cashier, who interposed no objection thereto, and no effort was made by him or any other officer of the bank to prevent it. Indeed, it is not shown that any intention or desire was entertained by any officer of the bank to subject in any manner the stock to pay the indebtedness of Wilson. It appears, however, to have been understood by all parties at the time that Wilson was in failing circumstances. No principle of equity or law required defendant to refrain from taking the stock in security or satisfaction of the debt for which he was bound, on the ground that he was an officer of plaintiff.

Wilson had the right fairly to prefer defendant in making payments of his indebtedness, and surely defendant had the right to accept such payment. The fiduciary relations of defendant toward the plaintiff, which, it may be conceded, demanded *uberrima fides* in the discharge of his duties, did not require him to sacrifice his own rights under contracts, or

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appropriate payments voluntarily made upon claims in his favor to indebtedness held by the bank.

The authorities cited by plaintiff's counsel to support their position, that defendant in equity could not accept payment from Wilson, and thereby defeat the right of the bank, are not applicable to the case made by the testimony. The rules recognized by them are applicable to purchases of property or other transactions whereby those discharging duties under fiduciary relations realize profits or benefits from the use of a trust fund. Equity holds the beneficiaries entitled to receive such profits or benefits.

V. The transfer of the stock to defendant did not conform to the requirements of the regulations adopted by the corporation upon that subject. We have seen that the by-law requiring the transfer to have the assent and approval of the directors cannot be enforced to defeat defendant's rights. Failure to follow other requirements of the charter or by-laws would not, in the absence of any rights to or lien upon the stock held by plaintiff, defeat defendant's right to hold the stock, and enforce a transfer in proper form. As between Wilson and defendant the transfer passed an equitable interest, at least, in the stock. As against Wilson this equity, it cannot be doubted, may be enforced, and a legal transfer based thereon may be obtained by defendant. The bank, as we have seen, having no lien upon or interest in the stock, can offer no obstacle to the enforcement of defendant's equitable rights. Defendant, therefore, must be regarded in equity as the owner of the stock. This doctrine, we think, is the undoubted rule of the authorities. See Angell & Ames on Corporations, §§ 354, 355, 356, and 575, and cases cited.

The foregoing discussion disposes of all questions arising in the case. The decree of the Circuit Court is reversed, and the cause is remanded for a decree in harmony with this decision.

**REVERSED.**

## THE STATE V. ORSLER.

1. **Surety : BAIL: EFFECT OF ARREST.** When a person is held to answer a criminal charge by a justice of the peace, and an indictment is subsequently found against him, whereupon the court directs a warrant to issue for his arrest, the surety is discharged when the arrest is made and the party indicted is taken into custody.

*Appeal from Pottawattamie District Court.*

SATURDAY, APRIL 20.

ACTION upon a bail bond whereby defendant was bound as surety for the appearance of one Crow before the District Court, who was held to answer a charge of felony by a justice of the peace. A default was entered by the District Court and the bail was declared forfeited. The answer alleges that Crow did appear, and, after indictment, was arrested upon a warrant issued by order of the District Court, and was thereafter permitted to escape by the sheriff. The cause was tried to a jury, and a special verdict rendered by direction of the court, whereon judgment was rendered against defendant, from which he now appeals.

*Sapp, Lyman & Ament, for appellant.*

No appearance for the State.

BECK, J.—The facts, as disclosed by the special verdict, are these: Crow was indicted upon the charge for which he was held to bail upon the bond executed by defendant, and, thereupon, an order was made upon the indictment directing a warrant to issue for his arrest. The warrant issued as directed, and Crow was arrested, but permitted to go at liberty by the sheriff, upon the order of the court. This arrest and release were made before default was entered and the bail was forfeited.

1. **SURETY:** bail:  
effect of arrest.

In our opinion, the order for the warrant, its issuance, and Crow's arrest thereon, and his subsequent release upon the order of the court discharged defendant, and the default and forfeiture of the bail, subsequently declared, were illegal.

The District Court has authority to order the arrest of one held to bail to answer a criminal charge, "when, upon the finding of an indictment, the court deems the bail taken by the committing magistrate insufficient." Code, § 4601. The order for the arrest of the accused was authorized by this section. We will presume that the court acted rightly, upon facts justifying the order.

The prisoner was lawfully in the custody of the sheriff. The bail before given was then discharged. The law does not contemplate that the surety shall be responsible for the appearance of a prisoner in the lawful custody of the law. It is to be presumed that the arrest and custody takes the place of the bail to secure appearance. The surety being discharged of liability, we know of no law which will permit the obligation to be again imposed upon him without his consent. We are of the opinion that the arrest of the accused released the bail bond. See *The State v. Holmes*, 23 Iowa, 458; *Smith v. Kitchens*, 51 Geo., 158; 21 Am. Rep., 232.

REVERSED.

## JONES V. GLASS ET AL.

1. **Husband and Wife: LIABILITY OF WIFE.** The wife is personally liable with her husband for the expenses of the family, and a personal judgment may be rendered against her therefor, in a joint action against her and her husband, notwithstanding the husband may have been discharged in bankruptcy.

*Appeal from Winneshiek Circuit Court.*

SATURDAY, APRIL 20.

ACTION upon account against a husband and wife for family expenses. The indebtedness was contracted by the husband, the defendant James Glass, in 1871. Afterward he was discharged in bankruptcy. The court rendered judgment against the wife, the defendant Louisa Glass, and she now appeals.

*Charles P. Brown*, for appellant.

*E. E. Cooley*, for appellee.

ADAMS, J.—The appellant contends that, under the Revision of 1860, the wife did not become personally liable for family expenses where the indebtedness was contracted by the husband. The provision upon this subject is to be found in section 2507, and is in these words: "The expenses of the family \* \* \* \* \* are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly, or the husband separately." This is substantially the same as section 2214 of the Code, except that the latter provides that either may be sued separately. Under the Code this court has held that the wife is personally liable. *Smedley v. Felt*, 41 Iowa, 588; 43 Iowa, 608. If she was not personally liable under the Revision, her personal liability under

1. HUSBAND  
and wife:  
liability of  
wife.

Anderson v. Hall.

the Code must result from the provision that she may be sued separately. But we understand this provision to relate to a mere matter of practice. We do not think it should determine the character of the judgment as personal or otherwise. If a personal judgment can be rendered against her when sued separately, we think it might when sued jointly with her husband. The question presented to us in this case, therefore, seems to us to be substantially determined by *Smedley v. Felt*, above cited.

But it is urged that a joint action cannot be maintained, because the husband has been discharged in bankruptcy, and that under the Revision, which was in force when the debt was contracted, none but a joint action can be maintained. If, however, the change made by the Code is designed merely to regulate the practice, and does not affect any substantial right, then the Revision would not control the form of action in that respect. We think that the wife became personally liable, and that, at the time the action was brought, she was subject to be sued separately. If so, an action can be maintained against her, notwithstanding her husband's discharge.

AFFIRMED.

## ANDERSON V. HALL ET AL.

48	346
115	625
115	626
115	632

1. Injunction: JURISDICTION: PRACTICE. To restrain the enforcement of a judgment by execution, the remedy must be sought in the county and court where the judgment was rendered upon which the execution issued. The fact that the judgment may have been obtained in a county whose court had not jurisdiction would not vary the rule.

*Appeal from Emmet Circuit Court.*

SATURDAY, APRIL 20.

A JUDGMENT was rendered by a justice of the peace of Palo Alto county against the plaintiff, in favor of the defendant

## Anderson v. Hall.

Hall. A transcript of said judgment was filed in the office of the clerk of the Circuit Court of Palo Alto county, and judgment entered thereon in said Circuit Court. An execution was thereon issued directed to the sheriff of Emmet county, and a transcript of the judgment filed in the proper clerk's office in the last named county. The sheriff being about to levy the execution on the property of the plaintiff, the latter commenced this action, the nature and object of which is to restrain such levy and the enforcement of said judgment, on the ground it is absolutely void, because the justice of the peace had no jurisdiction of the person of the defendant.

A temporary injunction was granted, which the court below refused to dissolve, and defendants appeal.

*E. B. Soper*, for appellant.

*Hawkins & Jones*, for appellees.

SEEVERS, J.—When the transcript was filed in the office of the clerk of the Circuit Court of Palo Alto county, it, in effect, amounted from that time to a judgment of the Circuit Court of said county, and could only be enforced by execution issued thereon by the clerk of such court. Code, § 3568. Such execution may issue into any county in the State. Code, § 3027.

When proceedings in a civil action, or on a judgment or final order, are sought to be enjoined, the suit must be brought in the county and court in which such action is pending, or the judgment or order was obtained. Code, § 3396.

The defendants moved the court to dissolve the injunction, because the judgment on which the execution issued was rendered in Palo Alto county, and the injunction issued by and from the Circuit Court of Emmet county. The motion should have been sustained. *Lockwood v. Kitteringham*, 42 Iowa, 257. In this last case the execution was special, and in the one at bar it is general. In all other respects the cases are iden-



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Bolton v. Daily.

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tical. We are unable to see that the statute makes any distinction between a general and special judgment or execution, when the injunction is brought by a party to the judgment who seeks to enjoin the collection thereof.

It is, however, insisted if the action was brought in the wrong county, the only remedy was to move to change the place of trial. Code, § 2589.

The difficulty in this view is, that the Circuit Court of Emmet county had no jurisdiction of the subject-matter, and consent, even, never confers jurisdiction in such case. Besides this, if Code, § 3396, is compared with the corresponding section, 3778, of the Revision, we think no other rule would carry out the intent of the change made.

The latter section only required proceedings to restrain a civil action to be brought in the county where the action or proceedings therein were pending. The Code extended this to proceedings under a judgment or final order, and requires the injunction to be brought in the county and court where the action is pending, or the judgment or order was obtained. The Emmet Circuit Court had no power to issue an injunction restraining the execution in question, nor had it the power to set aside a judgment rendered in the Palo Alto Circuit Court.

REVERSED.

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BOLTON V. DAILY.

1. Evidence: ATTORNEY'S FEE. In an action on account for legal services the plaintiff testified that, pending his employment, an agreement was made between him and his client for "more than an ordinary fee," upon the ground that the employment involved him in some complications that were compromising him in his profession: *Held*, that he might be compelled to state upon cross-examination what those complications were.

*Appeal from Mahaska Circuit Court.*

SATURDAY, APRIL 20.

ACTION on account for legal services. One item of charge is five hundred dollars for services in a divorce suit. The plaintiff testified that while the case was pending, and when about two-thirds of the work was done, he desired to be relieved from the case, and that he told the defendant that he would be relieved unless he had a contract for more than an ordinary fee. He testified that at first the defendant refused to give it, but afterward agreed to. The plaintiff gave as a reason why he exacted more than an ordinary fee, that there were some complications that were compromising him in his profession, as well as otherwise. The defendant denied all agreement to give five hundred dollars as a fee. Upon cross-examination of the plaintiff as a witness in his behalf, the defendant's counsel asked him to state what the complications were that existed between him and the defendant at that time, that led to the making of the contract. To this the counsel for the plaintiff objected as immaterial, and the objection was sustained. Judgment for plaintiff. Defendant appeals.

*John F. Lacey*, for appellant.

*Lafferty & Johnson*, for appellee.

ADAMS, J.—We think that it was proper to ask the plaintiff what the complications were which constituted the alleged basis for exacting what the plaintiff calls more than an ordinary fee. We understand by *more than an ordinary fee*, more than the reasonable value of the services, estimated according to the custom of charging for like services in the court in which the services were rendered. We think that where an attorney sets up an express agreement to pay such a fee, exacted of a client when the work was two-thirds done, under a threat of withdrawing from the case if

1. EVIDENCE:  
attorney's  
fee.

Cowen v. Boone.

the agreement was not made, nothing but the best of reasons would be sufficient to uphold the agreement. No attorney can be permitted to take advantage of his relation to his client, and the exigency of his client's business, to exact an unconscionable agreement.

But there is still another ground upon which the cross-examination should have been allowed. There was a direct conflict between the testimony of the plaintiff and the testimony of the defendant, as to the existence of such an agreement. The plaintiff felt the necessity of supporting his testimony as to the fact of the agreement by giving a reason why such an agreement was made. The reason, as given, is a mysterious one, and far from satisfactory. It is difficult to conceive how the plaintiff could be so complicated as to justify him remaining in the case for an extraordinary fee, but not for an ordinary one. How far the reason given for the agreement supported the plaintiff's testimony, as against that of the defendant, it was for the jury to determine. The complications, then, constituting the alleged reason were, we think, a proper subject for cross-examination. In disallowing a cross-examination upon that subject we think the court erred.

REVERSED.

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COWEN V. BOONE ET AL.

1. **Appeal : WHEN IT LIES.** An appeal lies from an order of the court overruling a demurrer when such ruling involves the merits of the case, and the party at the time elects to stand upon his demurrer.
2. **Attorney : LIEN OF : WAIVER.** Where an attorney obtained judgment in favor of his client, and filed a claim for a lien thereon, and afterward procured the satisfaction of the judgment by perfecting the client's title to land attached in the action, *held*, that, whatever lien he might have been entitled to upon the land attached, in the hands of the adverse party, it was waived when he procured satisfaction of the judgment, and the transfer of the title to his client.

48	350
80	144
48	350
86	183
48	350
93	774
48	350
99	639
100	173
48	350
115	472

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 Cowen v. Boone.
 

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*Appeal from Harrison District Court.*

SATURDAY, APRIL 20.

ACTION to foreclose a mortgage. It was alleged in the petition that the defendants Bolter & Davis claimed to have a lien on the premises, but that the same was junior and inferior to the mortgage. Bolter & Davis, in an answer filed by them, alleged that they, as attorneys at law, in 1876 commenced an action for Annetta Marble against William H. Marble, in which an attachment issued and the land described in the mortgage duly attached. That subsequently a judgment was rendered in said action against the defendant therein for the sum of \$1,599.80 and costs, and "the title to said land perfected in said Annetta Marble by said Bolter & Davis," and they "filed their attorney's lien upon said judgment, which lien still exists." A transcript of the judgment and lien as entered on the judgment docket is made an exhibit. The lien was filed and entered on the judgment docket February 7, 1876, and the mortgage was not executed until after that time.

It is further alleged in the answer that Annetta Marble sold and conveyed the said premises to the defendant Boone, and that he executed the mortgage in question to secure the payment of a portion of the purchase money; and that said "Annetta Marble took said mortgage upon said property from said Samuel Boone, \* \* \* with full, actual knowledge of the prior, senior and superior lien of said defendants." To this answer there was a demurrer, which, being overruled, the plaintiff appeals.

*Barnhart & Cadwell, for appellants.**Bolter & Davis, pro se.*

SEEVERS, J.—I. The abstract states: "This cause came on for hearing upon the demurrer," and after hearing arguments of counsel thereon the "court entered an order and judgment ordering and adjudging that said

1. APPEAL;  
when it lies

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Cowen v. Boone.

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demurrer be overruled, to which order and judgment of the court plaintiff at that time excepted, and elected to stand thereon."

It is insisted by the appellees that no judgment was entered or rendered by the court, and that, therefore, this appeal, to say the least, is premature.

An appeal lies from "an intermediate order involving the merits, and materially affecting the final decision." Code, § 3164.

The court ordered and adjudged that the demurrer be overruled, and the plaintiff elected to stand thereon; that is to say, he refused to reply. Such an entry of record, we think, gives a party the right to appeal therefrom.

II. The grounds of demurrer are—*First*, "that the facts alleged \* \* purport to constitute a cause of action, or counter-claim, in favor of said defendants, against said plaintiffs, and that the facts therein stated do not entitle defendants to the relief demanded; and *second*, that the facts therein alleged do not constitute a defense, either in whole or in part, to plaintiff's cause of action."

It is insisted, as no counter-claim is alleged, and as the matters pleaded in the answer are not set up as a defense to the foreclosure of the mortgage, that, therefore, the demurrer was properly overruled.

This may be conceded. The demurrer, however, is both general and special (*Hanna v. Hawes*, 45 Iowa, 437), and as the general ground allowed in equitable cases is substantially stated in the demurrer, it is sufficient. Code, §§ 2648, 2649, 2664.

III. The only necessary question is, which of these parties  
2. ATTORNEY: has the prior lien on the premises described in  
lien of: the mortgage.  
waiver.

The lien of an attorney is prescribed and fixed by a statute which has been in force, and now exists, without substantial change, since 1851 (Code of 1851, § 1618; Revision, § 2708; Code, § 215), and, so far as it affects this controversy, provides

that an attorney has a lien on "money due his client in the hands of the adverse party \* \* \* from the time of giving notice in writing to such adverse party;" which notice, under the Code, may be entered "in the judgment docket opposite the entry of the judgment." But this mode of giving notice in no manner affects the nature and extent of the lien.

Unless the prescribed notice has been given, the parties could settle and adjust the judgment or matter in controversy, without reference to the claim of the attorney for his fees. *Casar v. Sargeant*, 7 Iowa, 317. The "statute does not give the attorney a lien upon a judgment as a judgment." *Hurst v. Sheets and Trussell et al.*, 21 Iowa, 501. But he has a lien on money due his client in the hands of the adverse party from the time of giving the required notice.

As between Annetta Marble and W. H. Marble, the defendants had a lien on the money due on the judgment, and it may be conceded (a point, however, which we do not determine) that they had the right to enforce such lien in the same manner and to the same extent the plaintiff in the judgment could enforce its payment; that is to say, that the lien of the attorneys carried with it the lien of the judgment or attachment.

The title to the land which had been attached "was perfected in said Annetta Marble by these defendants." How or in what manner this was done is not disclosed, nor do we think the manner of doing it material. Now defendants insist that their lien, as attorneys, attached to and continued to exist on the land after they had succeeded in perfecting the title thereto in their client. She being the owner of the land, sold it to the defendant Boone. The mortgage, being taken for a portion of the purchase money, was transferred by her to the plaintiff.

Certainly, when the defendants perfected the title in their client without obtaining payment for their services, W. H. Marble would not be bound to pay them. It must, we think, be true as between Boone, the plaintiff, and the defendants,

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Robinson v. The First National Bank of Cedar Rapids.

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that the latter should be deemed to have waived their lien. In fact the lien was on the money due from the adverse party to the client of defendants.

Now, suppose the latter had collected the money, and paid it over without satisfying the amount of the lien, certainly they would be deemed to have waived it, and the judgment debtor would be discharged.

Now, conceding defendant's theory as to their lien to be true, this is precisely what they have done; for their claim is that the filing of their lien created a lien on the land in the hands of the judgment debtor, and the title to this land they "have perfected" in their client, without protecting themselves. We are of the opinion that the judgment debtor, Boone, and the plaintiff had the right to suppose the lien of defendants to have been satisfied or waived, and that the mortgage lien is superior to the lien of defendants, who, in fact, have no lien on the land.

REVERSED.

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ROBINSON v. THE FIRST NATIONAL BANK OF CEDAR RAPIDS.

1. **Practice in the Supreme Court: TRIAL DE NOVO.** The consent of parties to the entry of an order in the court below, that a case be tried upon written evidence, obviates the necessity for a motion for that purpose, and entitles either party to a trial *de novo* in the Supreme Court.
2. **Tax Deed: OF WHAT CONCLUSIVE EVIDENCE.** Where the acts of assessment, listing and levy are admitted, a tax deed, based thereon, is conclusive evidence that the manner of their performance was according to law.
3. —: **NOTICE BEFORE EXECUTION OF.** Under section 898 of the Code the notice required by sections 894 and 895 to be given the owner and occupant of land sold for taxes, before the execution of a tax deed therefor, is not necessary in cases where sales were made before the enactment of those provisions.

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Robinson v. The First National Bank of Cedar Rapids.

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*Appeal from Tama Circuit Court.*

SATURDAY, APRIL 20.

ACTION in chancery to quiet the title in plaintiff of three lots in Tama City. The answer sets up that the fee simple title to the property is in the defendant, and shows that the plaintiff claims title under tax deeds which are alleged to be void, and that defendant is entitled to redeem from the tax sale upon which the deeds were executed, and prays that defendant may be permitted to redeem from the tax sales. There was a decree granting the relief prayed for by defendant. Plaintiff appeals.

*Struble & Goodrich* and *Robinson & Lacy*, for appellant.

*Hubbard, Clark & Deacon*, for appellees.

BECK, J.—I. The plaintiff claims title under two tax deeds executed October 12, 1874, upon sales of the property for the taxes of 1870, made October 4, 1871.

The defendant insists, in its answer, that the tax deeds are void, and it has the right to redeem from the sales, on the ground that the notice required by Code, § 894, was not given. In amended answers the defendant alleges that the tax sale was void, because of the fraudulent agreement of plaintiff and other bidders at the sale not to make bids against each other, and for the reason that the several lots, being distinct tracts, were assessed and taxed together at one valuation in gross, and that no taxes were, in any manner, carried out upon the tax list for 1870 "against the property," nor did said tax list, at any time, show any amount of taxes to be due upon the property.

At the first term of court after the commencement of the action an order was made upon the consent of the parties that the cause be tried upon depositions.

The plaintiff was permitted to introduce the tax deeds in evidence against defendant's objection, and to read the dep-



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Robinson v. The First National Bank of Cedar Rapids.

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osition of the assessor who listed the property, showing that two of the lots were inclosed and used together as a homestead, and the buildings thereon were situated partly upon each lot. The record shows that "it was admitted defendant holds the legal title to the lots in controversy, unless divested by the tax deeds offered in evidence," and that "the defendant admits that plaintiff holds the legal title to the lots in controversy, unless defendant is entitled to redeem from said tax deeds for reasons stated in the pleadings." The defendant introduced in evidence the tax lists for the year 1870, so far as they relate to the property in controversy, and proposed to introduce the oral testimony of a witness to prove the combination at the sale between plaintiff and other bidders to prevent competition. This oral testimony, upon plaintiff's objection, was rejected, on the ground that the court had ordered the cause to be tried upon written testimony. It was admitted that the notice provided for in Code, §§ 894-5, had not been given.

II. It is insisted by defendant that the case is not triable *de novo* in this court, for the reason that no motion was made in the court below for a trial upon written testimony. As we have above stated, an order was made for such a trial upon consent of the parties.

1. PRACTICE in  
the supreme  
court: trial *de*  
*novus*.

The statute provides that "if any party shall \* \* \* move the court for a trial upon written evidence," the court shall so order, and the testimony upon which the cause shall be tried shall be sent to this court, and upon it the cause shall be tried here *de novo*. Code, § 2742.

The statute confers upon the court the authority to require the case to be tried upon written testimony, and directs that this authority shall be exercised upon a motion. It will be observed that the motion so made is not necessary to confer upon the court authority to make the order, but is simply the means of invoking the exercise of authority. If, by agreement, both of the parties unite in asking for the order, surely the authority may be exercised, for it is invoked by both and

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resisted by neither. This proposition is too plain to admit of doubt.

The cause must be regarded as being here for trial *de novo* upon the written testimony before us.

III. The defendant insists that the tax deeds are void for the reasons—*First*, the property is not sufficiently described upon the tax list; *second*, the valuation and taxes upon the property in question and other property are set out in gross upon the tax list, and the different lots and tracts are not valued and listed as to the tax on each separately. The objections cannot be urged here for the reason that, if presented in the answer, they were expressly waived and abandoned in the court below. They are used here, properly, if well founded, to assail the validity of the sales and deeds. If sustained, the deeds and sales would be set aside. The other defense pleaded sets up defendant's right to redeem from the sales on the ground that notice had not been given to defendant. As we have above shown, the defendants admitted, and the admission is made of record, that the tax title of the property is valid, if the right of redemption, as stated in the answer, because of the want of the notice, does not exist. It appears to us that defendant abandoned all defenses except his right to redeem.

IV. But another satisfactory answer to the objection is ready at hand. The tax deed is conclusive evidence of the

2. TAX deed: regularity of the manner of the assessment, listing  
evidence. and levy of taxes. It is *prima facie* evidence of the fact of assessment, listing and levy, but conclusive evidence that the manner thereof accords with the law. Code, § 897; Rev., § 784; *McCready v. Sexton & Son*, 29 Iowa, 356. The objection admits these acts, but is based upon the ground that they were not regularly performed, in that the description of the property upon the tax list was not sufficient, and the valuation and tax upon several separate tracts were in gross. These are matters that pertain to the manner of assessment, listing

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Robinson v. The First National Bank of Cedar Rapids.

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and levying, and are regarded by the law as conclusively established by the deeds.

V. The tax sales, it will be remembered, were had in 1871, and the deeds were executed in 1874. By chapter 124, 3. — notice., acts Fourteenth General Assembly, prior provisions were so amended that before a tax deed can be executed a notice, as prescribed, must be served upon the person in possession of the property, and upon the person in whose name the property was taxed, before a deed can be made upon tax sale. The provision is continued in the Code, § 894. Defendant insists that the statute is applicable to the tax case before us, and that the deed is invalid because the notice prescribed in the provision above cited was not given. The plaintiff contends—*First*, that under the constitution the provision cannot be applied by the courts to tax sales made before its enactment; *second*, that by the express terms of the act of the Fourteenth General Assembly, and of section 889 of the Code, the provision is applicable alone to sales made after its enactment.

Code, § 898, is in this language: "The provisions of this title [including the provision for notice above referred to] shall not affect sales heretofore made, or tax deeds given in pursuance of sales made before the taking effect of this Code." The language of this section is plain and easy of comprehension. Before its enactment deeds were executed upon tax sales without the notice required in the amendments of the statute referred to in the section. By the amendments, deeds executed without the notice having been given were invalid. But the section in hand declares that such amendments shall not affect "tax deeds given in pursuance of sales made before the taking effect of this Code." The expression "deeds given in pursuance of sales," means deeds executed upon sales. If the sales were made before the Code, the want of notice required by the amendments does not affect, invalidate the deeds.

It is argued by defendant's counsel that the language of the section just quoted refers to deeds given before the Code

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Schaentgen v. Smith.

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took effect, for the reason that the word *given* is in the past tense, and therefore relates to time before the Code. The error of this position is apparent. The word "given" is a past participle, having the nature of an adjective. Its tense relates to time prior to the time alleged of its substantive. It conveys no independent idea of time. It will be observed that the language of the section under consideration fixes no time of the execution of the deeds referred to, further than that expressed by the words "given in pursuance of sales made before the taking effect of this Code." The deeds referred to may be such as are given before the Code or after the Code, so that they be given in pursuance of sales made before the Code, in accord with the law prescribing the time for the making of the deeds, to be found elsewhere.

We conclude that, under Code, § 898, the notice prescribed in sections 894, 895, is not required to be given in cases where sales were made before the enactment of these provisions.

The constitutional question raised by plaintiff need not be considered. No other questions than those we have noticed are raised in the case.

It is our decision that the decree of the court below be reversed, and the cause be remanded for a decree in accord with this opinion.

REVERSED.

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## SCHAENTGEN V. SMITH.

1. **Venue: CHANGE OF.** After one change of venue the party applying for another change must allege and show that the cause upon which he bases his application was not in existence when the first change was obtained.

*Appeal from Pottawattamie Circuit Court.*

SATURDAY, APRIL 20.

**Action at law. Judgment for plaintiff. Defendant appeals.**

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Schaentgen v. Smith.

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*Story & Hammond*, for appellant.

*Clinton, Hart & Brewer*, for appellee.

BECK, J.—The cause was brought in the Circuit Court of Fremont county, and the venue changed, upon application of plaintiff, to Pottawattamie county. At the first term of the Circuit Court of the last named county, after the cause was filed therein, defendant moved to change the venue, on the ground of plaintiff's influence over the people of the county, and duly supported the motion with affidavits. It was overruled, and this action of the court constitutes the only ground of the single error assigned.

1. VENUE:  
change of. Code, § 2591, provides that "after one change [of venue] no party is entitled to another for any cause in existence when the first change was obtained." Defendant's application for a change did not show that the cause upon which he based it was not in existence when the former change of venue was ordered; for this reason the motion was overruled. Defendant's counsel insist that the language above quoted means that a party having had a change of venue is not entitled to another upon his own application, unless he shows that the cause did not exist when the first change was ordered. But we think this is not the import of the language. Its obvious meaning is this: "After one change, either party to the action is not entitled to a change of venue for any cause in existence when the first change was obtained." Explanation and criticism upon the language could not make it plainer.

The court below rightly overruled the application for the change of venue.

**AFFIRMED.**

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 McMannis v. Rice.
 

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48	361
104	435

## McMANNIS ET AL V. RICE.

1. **Mortgage: ADMINISTRATOR.** A mortgage by an administrator, in which the name of the mortgagee does not appear, cannot be approved by the probate court. To render a mortgage by an administrator valid, it must be capable of identification as the one approved by the court.
2. **———: ———: JURISDICTION.** Under a guardian's petition asking for an order to sell real estate, the court does not have jurisdiction to make an order authorizing the guardian to mortgage it.

*Appeal from Franklin Circuit Court.*

SATURDAY, APRIL 20.

**ACTION** to set aside foreclosure sale. The plaintiffs are heirs of one James McMannis, deceased. The mortgaged land belonged to his estate. At the date of the mortgage, March 29, 1873, the plaintiffs, George W. McMannis, James McMannis and John McMannis, were minors. Catherine McMannis, the widow of the decedent and mother of the minors, was their guardian. As such guardian she borrowed money of the defendant for the support and education of her wards. The mortgage in question was given as security for such money. Afterward the mortgage was foreclosed and the property was purchased by the defendant at the foreclosure sale. The plaintiffs were not made parties to the action, and they insist that the mortgage and sale were invalid for various reasons, which will be set out in the opinion. Decree for plaintiffs. Defendant appeals.

*S. P. Leland*, for appellant.

*McKenzie & Hemingway*, for appellees.

**ADAMS, J.**—The grounds upon which the plaintiffs seek relief are stated as follows: *First*, the petition under which

1. **MORTGAGE:** the order was made authorizing Catherine McMannis to mortgage the property asked only for an order authorizing her to sell it; *second*, in the proceedings under the petition no guardian *ad litem* was appointed for the minors; *third*, Catherine McMannis signed the mortgage as administratrix and not as guardian, while she was not in fact administratrix, nor had she obtained any order to mortgage as administratrix; *fourth*, the mortgage never was approved; *fifth*, it does not appear that any bond was filed as provided by law.

It will be observed that no question is before us as to whether Catherine McMannis is liable as guardian or otherwise for the money borrowed. The only question is as to whether the mortgage is valid.

The mortgage was executed under the Revision. Section 2558 is in these words: "Deeds may be made by the guardian in his own name, but they must be returned to the court, and the sale or mortgage approved before the same are valid."

Unless, then, the mortgage in question was approved, it is evident it has no validity. The plaintiffs insist that it never was approved. The record upon which the defendant relies as showing an approval, is in these words:

"February Term, 1875. Circuit Court of Franklin County. *Estate of Patrick McMannis v. Catherine McMannis*, administratrix. (Records, page 344.)

"Now on this day this cause coming on for hearing, upon plaintiff's motion to approve the mortgage heretofore executed by said administratrix to ——— upon the real estate belonging to said estate, and it appearing to the court that said mortgage is in due form of law, and that in executing said mortgage the said administratrix has complied with the requirements of the law, the said mortgage is therefore hereby approved."

The foregoing shows an approval of some mortgage, but was it an approval of the mortgage in question? We cannot say that it so appears. The proceeding is entitled "*Estate of Pat-*

## McMannis v. Rice.

**RICK McMannis v. Catherine McMannis, administratrix.**" The name of the defendant to whose estate the land in question belonged was *James McMannis*. Patrick McMannis and James McMannis are not, apparently, the same person.

Again, no mortgagee is named in the mortgage which was approved, but a blank is left for the name. This would indicate that the mortgage approved did not contain the name of a person as mortgagee. The mortgage in question was executed and delivered to the defendant some two years before that time, and the name of the defendant as mortgagee must be presumed to have been written therein at that time.

Looking at the record alone, which is all the evidence which we have before us, we have to say that it does not appear to us that the mortgage therein described is the mortgage in question.

We are of the opinion, too, that the defendant's mortgage was not entitled to be approved. The guardian's petition 2. \_\_\_\_: \_\_\_\_: was an application to sell, and not to mortgage. jurisdiction. The statute required (section 2553 of the Revision) that a copy of the petition should be served upon each minor. From this it is to be assumed that the minor has a right to know precisely what is applied for. The object, of course, is to allow objections to be interposed, if there are any. We think, therefore, that an order to mortgage, of which the minors had no notice, was made without jurisdiction.

Such being our view, it is unnecessary to consider the other objections urged to the mortgage. The judgment of the Circuit Court must be

**AFFIRMED.**



## VANCE v. FALL.

1. Costs: NEXT FRIEND. In the absence of a statute providing otherwise, the next friend in an action by an infant plaintiff is liable for costs.

*Appeal from Monroe District Court.*

SATURDAY, APRIL 20.

J. C. F. VANCE is a minor. This action was brought by Samuel Vance, his next friend. Recovery was sought of defendant for an alleged malicious prosecution, and for slanderous words spoken of said J. C. F. Vance. There was a trial by jury, and a verdict and judgment for the defendant. The court rendered judgment against Samuel Vance, as next friend, for the costs of the action. Exceptions were entered to the judgment, and an appeal therefrom was taken. Afterward, Samuel Vance filed a motion to retax the costs, which motion was overruled, and an appeal was taken.

*H. B. & L. C. Hendershott*, for appellant.

*Perry & Townsend and Dashiell & Andrews*, for appellee.

ROTHROCK, CH. J.—At common law, and by the Statute of Westm., 16, 48, and 2 C., 15, an infant cannot sue in his own name, but the action must be brought by his guardian or next friend. The Code, § 2565, provides that an action of a minor must be brought by his guardian or next friend. This is a simple recognition of the common law rule. The rule always has been, and the Code provides, that "costs shall be recovered by the successful against the losing party." Whatever exceptions there may be to this rule need not now be considered.

Our statute being merely declaratory of the common law, the question presented by this appeal must be determined by

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Howder v. Overholser.

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ascertaining the rights of the parties, independent of any statute.

It appears that it has almost uniformly been held that the next friend of an infant plaintiff is liable for costs, except in those jurisdictions where such liability is regulated by statute. Schouler's Dom. Relations, 594, and authorities cited in notes; 1 Am. Leading Cases, 325, 329; Bacon's Abridgment, vol. 5, 153.

At common law, the next friend of an infant plaintiff was not a competent witness in the action, because of his liability for costs. 1 Greenleaf's Evidence, §§ 347, 391.

The Code of 1851, § 1689, provided that the next friend should be responsible for costs. In the Revision of 1860, and in the present Code, there is no such express provision. It may be said that the repeal of the provision making him liable indicates a legislative intent that there should be no such liability. We think, however, that as that provision was merely declaratory of the common law, it may well be said it was omitted because the next friend is liable without any statutory enactment.

AFFIRMED.

48	365
80	404

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HOWDER V. OVERHOLSER.

1. **Costs : APPORTIONMENT OF.** Where, in an action before a justice of the peace upon four separate items of demand, the judgment of the justice in favor of the plaintiff was appealed from, and the plaintiff recovered one dollar in the Circuit Court, *held*, that the case was a proper one for apportionment of costs.

*Appeal from Woodbury Circuit Court.*

SATURDAY, APRIL 20.

PLAINTIFF sued the defendant before a justice of the peace for breach of warranty on three farming implements, claiming twenty-five dollars damages on one and eight dollars damages

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Howder v. Overholser.

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on each of the others. He also claimed fifty cents for drayage. The answer was a general denial. There was a trial by jury, and a verdict and judgment for plaintiff for twelve dollars. Defendant appealed to the Circuit Court, and the same issues were there tried by jury, and a general verdict was rendered for the plaintiff for one dollar. The defendant filed a motion to tax the costs in the Circuit Court to the plaintiff because appellant received a more favorable judgment than that appealed from. The court sustained the motion in part by ordering that the plaintiff pay one-third of all the costs, including the costs which accrued before the justice of the peace. From this order plaintiff appeals to this court.

*Constant R. Marks*, for appellant.

*Vanatta & Son*, for appellee.

ROTHROCK, CH. J.—Section 2933 of the Code provides: "Costs shall be recovered by the successful, against the losing party. But where the party is successful as to a part of his demand, and fails as to part, unless the case is otherwise provided for, the court may, on rendering judgment, make an equitable apportionment of the costs."

1. COSTS:  
apportion-  
ment of.

This was an action upon four separate items of demand. The aggregate amount claimed was forty-one dollars and fifty cents. The recovery in the Circuit Court was one dollar. We have held that where there is a single entire claim, upon which a party recovers an amount less than he demanded, there can be no apportionment of costs under the section of the statute above quoted. *Upton v. Fuller*, 43 Iowa, 409.

But this action was founded upon separate and distinct causes or claims, and we think it was a proper case for an equitable apportionment of costs. The fact that there was a general verdict for one dollar will not authorize the presumption that a recovery was had on all of the items claimed, in the absence of an affirmative showing to that effect.

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Howder v. Overholser.

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It is urged that the section above quoted is not applicable to this action, because costs, in appeals from justices of the peace, are regulated by sections 3592 and 3593 of the Code.

Section 3592 provides that "the appellant must pay the costs of the appeal unless he obtains a more favorable judgment than that from which he appealed." By section 3593 it is provided: "If the judgment below is against the appellant, he may proffer to pay a certain amount with costs, and if the final amount recovered be less favorable to the appellee than such proffer he shall pay costs of appeal."

The first of the above sections is applicable only to appeals taken by the party who recovers a judgment. *Best v. Dean*, 8 Iowa, 519. Section 3593 would control the rights of the parties if the defendant had proffered to pay an amount with costs greater than that finally recovered. As he did not do so, we think the court was not precluded from making an equitable apportionment of costs under section 2933. The defendant is no more concluded from demanding the proper apportionment than he would be in an original action.

The case of *Best v. Dean*, *supra*, is not inconsistent with the rule here announced. It was held in that case that where a defendant appealed from a judgment rendered against him by a justice of the peace, and, upon the trial of the appeal, the plaintiff recovered a less amount than was rendered by the justice, the plaintiff is entitled to recover the costs upon appeal. There was no other question in that case. The question of the apportionment of costs was not presented.

**AFFIRMED.**

48	368
79	493
48	368
115	79
48	368
130	522
e130	656

## MONINGER &amp; RINGLAND v. RAMSEY.

1. **Homestead: ANTECEDENT DEBTS.** The homestead descends to the issue of the owner charged with the debts of the latter which, in his life, could have been enforced against it, but free from such debts as could not, in his life-time, have been so enforced.

*Appeal from Boone Circuit Court.*

SATURDAY, APRIL 20.

F. C. Wood was the owner of a homestead in Boone county, in this State. She died in January, 1872, and by her will devised all her property to her three children. She owed debts contracted in New York before she acquired the homestead. In July, 1872, George Wood, one of the children, and a devisee under the will, made a mortgage upon an undivided one-third of the homestead. Appellants are the owners of said mortgage. Appellee, as administrator of the estate of F. C. Wood, after the execution and recording of said mortgage, petitioned the court to sell the homestead, to pay said New York debts. The devisees under the will, being the children of F. C. Wood, appeared in the proceedings to sell the land, and consented to the sale, and the land was sold. Appellants were not made parties to this proceeding. There is not sufficient of the proceeds of the sale to pay the debts contracted by F. C. Wood before she acquired the homestead, and also pay the mortgage held by appellants. Appellants claim that the mortgage, being less in amount than one-third the proceeds of the sale, should be paid out of said proceeds. The Circuit Court determined otherwise.

Moninger & Ringland appeal.

*John A. Hull*, for appellants.

*Webb & Dyer*, for appellee.

ROTHROCK, CH. J.—Counsel for the parties, by agreement,

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 Moninger & Ringland v. Ramsey.
 

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submit the question for determination in this court, in the following clear and concise form: "Does the homestead antecedent debts. descend to the issue of the owner, without regard to the rights of creditors, when claims are older than the homestead acquisition, and who could have subjected it to the payment of their claims if the owner had survived and held it?"

Section 1992 of the Code, so far as applicable to the question, is in these words: "The homestead may be sold on execution for debts contracted prior to the purchase thereof, \* \* \* \*."

Section 2008 provides that " \* \* \* \* the homestead descends to the issue of either husband or wife, according to the rules of descent, unless otherwise directed by will, and is to be held by such issue exempt from any antecedent debts of their parents, or their own."

F. C. Wood was a widow, and the devise to her children did not divert the homestead. No other disposition of the property was made by the will than that made by the law of descents.

The question presented must be determined precisely as if no will had been made, and involves the construction of the sections of the Code above quoted.

Construing the two sections together, we are of opinion that the antecedent debts of the parents referred to in section 2008 include only the ordinary, general indebtedness of the estate, and do not embrace debts which were contracted before the homestead was acquired. Any other construction would limit the liability of the homestead for debts, as provided in section 1992, to such as may have been reduced to judgment and are in course of collection by execution levied upon the homestead during the life of the parent.

We do not think this is a fair construction of that section. The homestead is not primarily liable for debts contracted prior to its purchase. It is only liable to be sold for such debts "to supply the deficiency remaining after exhausting

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The State v. Ridley and Johnson.

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the other property of the debtor liable to execution." The phrase, "the homestead may be sold on execution for debts contracted prior to the purchase thereof," found in, section 1992, is a form of expression used to declare the homestead liable for such debts, in so far as may be necessary to pay the same after exhausting the other property. The general provision in section 1988 exempts the homestead from "judicial sale." The exception contained in section 1992 subjects the homestead to judicial sale on execution in the contingency therein named. There is nothing in this section limiting the time of the collection of the debts for which the homestead may be seized. If liable to be seized, it cannot be said, from the language employed, that it must be levied upon prior to the death of the owner.

We are required to construe these sections so both will stand, if that can be done; and while some of us are not free from doubt, we think that section 2008 must be understood to provide that the heir holds the property free from the debts of the ancestor which, in his life, could not have been enforced against it.

**AFFIRMED.**

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### THE STATE V. RIDLEY AND JOHNSON.

1. **Criminal Law: COMPOUND OFFENSE: CONSTRUCTION OF STATUTE.** The term "compound offenses," as used in section 4300 of the Code, has reference only to cases where the same act constitutes in itself more crimes than one, and does not include cases in which two or more crimes are committed in succession.
2. ———: **PRACTICE: SPECIAL INTERROGATORIES TO JURY.** Section 2808 of the Code, providing for the submission of particular questions of fact to the jury, has reference to trials in civil actions only.

*Appeal from Polk District Court.*

SATURDAY, APRIL 20.

THE defendants were tried upon an indictment of which the following is a copy:

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The State v. Ridley and Johnson.

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"The grand jury \* \* \* \* \* accuse William Ridley and C. M. Johnson of the crime of burglary committed as follows: The said William Ridley and C. M. Johnson, on the 2nd day of August, 1876, in the county of Polk, in the night-time of said day, unlawfully, feloniously and burglariously, did break and enter the store of one John Slatten, there situated, in which said store, goods, merchandise, and valuable things were then and there kept for use, sale, and deposit, with intent then and there the goods, chattels, money and property of the said John Slatten, in the said store then and there being, then and there unlawfully, feloniously and burglariously to steal, take and carry away; and two caddies of tobacco of the value of twelve dollars each \* \* \* of the personal goods, chattels and property of the said John Slatten, in the said store then and there being found, then and there unlawfully and burglariously did steal, take and carry away \* \* \* \* \*."

There was a verdict of guilty of larceny from a store in the night-time, and the defendants were sentenced to imprisonment in the penitentiary. Defendants appeal.

*Maxwell, Lee & Witter*, for appellants.

*J. F. McJunkin*, Attorney General, for the State.

ROTHROCK, J.—I. It is urged that the only charge in the indictment is that of breaking and entering a store-house, in the night-time, with intent to steal.

The court instructed the jury as follows: "10. In the facts set forth in the indictment are included three crimes, of different degrees of enormity—*First*, the crime of larceny in a store in the night-time, the highest; *second*, the crime of breaking and entering a store in which goods, merchandise, and valuable things were kept for use, sale and deposit, with intent to commit larceny, the next lower offense; *third*, the crime of simple larceny, the lowest."



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The jury were further instructed that under the indictment a verdict might be found for any one of the three crimes above named, if the evidence should be found sufficient to warrant such verdict.

The indictment in this case is substantially the same as that in *The State v. Hayden*, 45 Iowa, 11. In that case the defendant was found guilty of breaking and entering the store with intent to commit larceny. In this case the defendants were found guilty of larceny from a store in the night-time.

It was held in that case that the indictment was not bad for duplicity, because it charged but one offense—that of breaking and entering the store in the night-time, with intent to commit larceny—and the allegation that the larceny was actually committed should be regarded as pleading evidence, which might be rejected as surplusage.

That indictments in substantially the same form have been held good, see authorities cited in that case.

The indictment under our practice must charge but one offense, but it may be charged in different forms or counts to meet the evidence. The exception is "that in cases of compound offenses, where, in the same transaction, more than one offense has been committed, the indictment may charge the several offenses, and the defendant may be convicted of any offense included therein." Code, § 4300. There was no printed argument for the prosecution in the case of the *State v. Hayden*, *supra*, but in an oral argument by the late Attorney General it was urged that the crime charged was a compound offense.

We then examined that question to some extent, and were satisfied that this position was not correct. It is now again urged that this is a compound offense. Upon a re-examination of the question, we have not changed our views.

It may be somewhat difficult to determine exactly what is a compound offense. It must, we think, refer to a case where a particular transaction constitutes in itself two or more offenses. For example, if a married man should forcibly

1. CRIMINAL  
law: com-  
pound offense:  
construction  
of statute.

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have a carnal knowledge of a woman not his wife, he would, in the same act, commit the crimes of rape and adultery, and if such person should be within the prohibited degrees of consanguinity, he would commit the further crime of incest. In such cases, all the offenses are committed by the same act or transaction at the same point of time, and all may be charged in the same indictment.

But in the case at bar the breaking and entering with the unlawful intent was completely consummated before the larceny was commenced. The larceny was a distinct crime, and no part of the breaking with intent to commit a public offense.

Under section 3894 of the Code, the unlawful breaking and entering must be "with intent to commit any public offense." Suppose that instead of larceny the defendant had committed the crime of rape or murder, would it be proper to charge those offenses, not only in the same indictment, but in the same count, with the charge for the unlawful breaking and entering with the criminal intent? An indictment charging burglary and murder would be an anomaly under our practice. We have no doubt that such an indictment would not meet the requirements of our statute, that but one offense must be charged. If such an indictment cannot be sustained, for the same reason burglary, or the unlawful breaking and entering a storehouse, cannot be joined with larceny.

The defendants excepted to the instructions above referred to, and also moved in arrest of judgment.

We think the instructions were erroneous, and that the motion in arrest of judgment should have been sustained.

II. The defendants asked that certain interrogatories be submitted to the jury. The court refused to submit the same, for the reason, among others, that the law does not contemplate the submission of special questions of fact to the jury in criminal cases.

R. ———, practice: special interrogatories to jury.

In our opinion there was no error in this ruling.

It is not provided that interrogatories may be submitted to

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The State v. Ridley and Johnson.

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the jury by the court, upon the request of the parties, in criminal cases. It is provided in section 4463 that the jury, "when they are in doubt as to the legal effect of the facts proven, may, except upon an indictment for libel, find a special verdict." The jury themselves are to determine whether their verdict shall be special or general. It can only be special when the jury doubt as to the legal effect of the facts proven. Section 2808 of the Code, providing for the submission of particular questions of fact to the jury, has reference to trials in civil actions only.

III. There are a large number of exceptions taken to other instructions of the court to the jury, and to the refusal to give certain instructions asked by defendants.

A careful examination has satisfied us that these objections are not well taken. With the exception of the error above discussed, we think the instructions given by the court contain no prejudicial error, and are fully as favorable to defendants as they had the right to ask.

As the judgment must be reversed for the error in the tenth instruction above set out, and for overruling the motion in arrest of judgment, it is unnecessary to allude to the other exceptions in detail.

REVERSED.

ON REHEARING.

ADAMS, J.—It is claimed by the Attorney General that the almost universal practice in this State has been to join burglary and larceny in the same indictment, where the larceny was committed in connection with the burglary, and that such is the better practice, and in harmony with the general current of authorities. He claims, too, that the practice and authorities are not inconsistent with our statute on the subject—section 4300 of the Code. That section is in these words: "The indictment must charge but one offense, \* \* \* provided that in case of compound offenses, where in the same transaction more than one offense has been committed,

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The State v. Ridley and Johnson.

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the indictment may charge the several offenses, and the defendant may be convicted of any offense included therein." It is insisted by the Attorney General that burglary and larceny, where the larceny is committed in connection with the burglary, constitute a compound offense, and that both offenses may, therefore, be charged in the indictment, and that the defendant may be convicted of either.

It will be seen at once that the question presented is as to whether the burglary and larceny, when committed in connection, can properly be considered a compound offense. What precisely is a compound offense does not seem to be very well defined in the books. Indeed, so far as we have been able to observe, the expression is seldom used. An attempt, however, was made in the Code to define it. According to it a compound offense is committed when more than one offense is committed in the same transaction. But the Attorney General and counsel for defendant differ as to what constitutes a transaction. By the former it is insisted that, although breaking, entering and stealing are three different acts, they constitute one transaction. Counsel for the defendant deny this proposition.

Mr. Justice Rothrock, in his opinion in this case, illustrates his idea of what is meant by one transaction, in the sense in which it is used in the Code, as a transaction including two or more offenses, by supposing a case where a married man, by force, has carnal knowledge of a woman not his wife. He commits two crimes at once—rape and adultery. In such a case there would certainly be but one transaction, and it would be a clear case of a compound offense. So, too, there may be successive offenses which constitute a single offense. Assault and larceny constitute robbery. Both must be charged to constitute a charge of robbery. Proof of either would sustain a conviction for the offense proved. But burglary is complete without larceny. It consists of breaking and entering, with an intent to commit a public offense. If the burglars uperadds the actual commission of the offense for

which the burglary was perpetrated, shall the whole be considered as one transaction, constituting a compound offense, so as to justify charging both burglary and larceny in the same indictment, and render proper a conviction upon either; or is the burglary one transaction, and the larceny another, in such a sense as that they should be charged in separate indictments, and the defendant, if guilty of both, be convicted of both, and punished accordingly? It seems hardly reasonable that a conviction for one should exempt the defendant from conviction upon the other.

Where two persons break and enter a building with intent to commit larceny, and one repents and leaves the building immediately, and the other proceeds and commits the larceny, they are certainly not equally guilty. Yet it has been held that where a person adds larceny to burglary, the larceny may be considered as merged in the burglary, or treated merely as more conclusive evidence of the intent. This subject was elaborately discussed by Chief Justice Shaw in *Commonwealth v. Hope*, 22 Pick., 1. In that case it was held that a count in an indictment which charged the breaking and entering a dwelling-house with intent to steal, and actually stealing, was not bad for duplicity. The learned Chief Justice said: "Although, in strict construction, the facts charged constitute two distinct statute offenses, to-wit: breaking and entering a dwelling-house with intent to steal, and stealing in a dwelling-house, yet practically, as the whole consists of one fact, the conviction and sentence upon one has been held to embrace the other." He says further: "The averment of actual stealing is to be regarded as equivalent to alleging the intent to steal." While he seemed to regard the doctrine announced as in harmony with the general current of authorities, it will be seen, upon examination of the opinion, that he was evidently somewhat influenced by what he calls the course of their own legislation upon the subject. The question before us arises upon the construction of our statute, and it appears to us that we are required to follow where principles lead, rather

than to allow ourselves to be controlled by the decisions of States, the course of whose legislation has been different from ours.

Respecting the construction of the statute, it may be said that the word transaction might, without doing violence to the language, be understood to mean, as the Attorney General claims, all the successive acts constituting the breaking and entering, and the commission of the public offense intended to be committed. But it is evident that the word transaction might be understood as having a more limited meaning; and, upon principle, we think that we are required to give it a more limited meaning. If the commission of the public offense intended in the breaking and entering is a part of the same transaction in one case, it is in another. Suppose, as Mr. Justice Rothrock argues, the offense intended to be committed is rape instead of larceny, it would hardly be claimed that burglary and rape could be charged in the same indictment. Yet, if they are embraced in the same transaction, within the meaning of the statute, they might be, and the defendant might be convicted of either offense, though guilty of both; the sentence for either, under the doctrine of *Commonwealth v. Hope*, being regarded as embracing the other. Indeed, if the intended offense committed was murder, it would seem to follow that the burglary and murder could be charged in the same indictment, and that the defendant, though guilty of both, might be convicted of burglary, and that the sentence for burglary might be regarded as embracing both offenses. Most certainly this would not be claimed. But can we say that if larceny is the intended offense committed, it is to be regarded as a part of the transaction, and if the intended offense committed is anything but larceny, it is to be regarded as not a part of the transaction? We are unable to discover upon what principle such a distinction should be made.

If we had a statute providing a distinct punishment for burglary, where it is accompanied by the commission of the

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Dawson v. Graham.

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intended offense, we should think that burglary, so accompanied, might be regarded as a compound offense. In the absence of such statute we think that the burglary, and the intended offense committed, should be treated as distinct offenses, and punished accordingly.

But it is urged that the doctrine here announced is inconsistent with *State v. Hayden*, 45 Iowa, 11. In that case it was held that only burglary was intended to be charged. Stress was laid upon the fact that it was not claimed in the court below that larceny was charged. With that view it will be seen that the decision in that case cannot be regarded as inconsistent with the decision in this. The views which we have expressed are strongly supported in *People v. Garrett*, 29 Cal., 625, and *Wilson v. State*, 24 Conn., 65. The former opinion is adhered to, and the case is reversed.

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DAWSON V. GRAHAM.

1. **Vendor and Vendee: FRAUDULENT REPRESENTATIONS.** Where the plaintiff sold land, representing that it contained a large and valuable mineral deposit, *held* that, in the absence of a showing that there was no mineral in the land, as represented, a mere exaggeration as to the amount of the deposit would not constitute such a fraud upon the purchaser as to avoid a note given for the purchase money.
2. ——— : ———. In consideration of a note executed by defendant, the plaintiff agreed to convey certain land to a company of which defendant was a member: *Held*, that any fraudulent representation made by plaintiff as to the value of the property could only be taken advantage of by the company, and would not constitute a defense to an action against defendant on the note.
3. **Pleading: INTEREST.** Where a general demand for interest is made in the prayer of the petition, it is proper to include in the judgment interest not only to the time of the commencement of the action, but also up to the time when the judgment is rendered.

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Dawson v. Graham.

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*Appeal from Warren Circuit Court.*

SATURDAY, APRIL 20.

ACTION upon a promissory note. The defendant pleaded in his original answer a want of consideration. He averred that the note was given in pursuance of a contract whereby the plaintiff sold, and agreed to convey by deed of warranty, to the Buffalo Creek Oil Company, of which defendant was a member, a certain tract of land in the State of Pennsylvania; and he further averred that the plaintiff never executed the deed, and never had any title. There was a trial by jury, and verdict for the defendant. The plaintiff appealed to this court, and the judgment was reversed, upon the ground that it appeared from the evidence that, before the commencement of the action, the plaintiff caused a good title to the land to be conveyed to the company. The opinion is reported in 43 Iowa, 124. After the case was remanded, the defendant filed an amendment to his answer, averring that the plaintiff never offered or tendered a legal deed of conveyance, and that the company never took possession; also, that the plaintiff made certain false and fraudulent representations concerning the quality of the land, whereby he was damaged in the sum of one thousand dollars, for which he asks judgment. To so much of the answer as sets up fraud the plaintiff demurred, and the demurrer was sustained: to which ruling the defendant excepted. The case was then submitted to the court, without a jury, and judgment was rendered for plaintiff, for the amount of the note. The defendant appeals.

*Williamson & Parrott*, for appellant.

*Bryan & Seevers*, for appellee.

ADAMS, J.—I. The first error assigned is that the court erred in sustaining the demurrer. The alleged fraudulent



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1. **VENDOR and vendee: fraudulent representations.** representation consisted in saying that the land contained large deposits of coal, oil and mineral. The defendant avers that he was induced by the statement to execute the note; that the statement was untrue, and was made with intent to cheat him.

The plaintiff demurred upon the ground, among others, that the answer does not show that the defendant relied upon the representations of the plaintiff, and we have to say that we think that the demurrer is well taken. While it is averred in the answer that the defendant was induced by the false and fraudulent representations to execute the note sued upon, still it is necessary for us to look at the subject-matter of the representations to enable us to determine whether the defendant can be considered as having relied upon them. Kerr on Fraud and Mistake, page 77. In mere matters of opinion, every one is presumed to rely upon his own judgment. Story's Equity Jurisprudence, § 179. The defendant does not aver that the land did not contain coal, oil and mineral. No presumption that it did not can be entertained for the purpose of establishing fraud. We may, then, take the fact to be (nothing being shown to the contrary) that the land did contain coal, oil and mineral, and that what the plaintiff said about it was a mere exaggeration. It is not averred that the plaintiff represented that it contained any particular quantity of coal, oil and mineral. He merely said that it contained large deposits. What would constitute large deposits of coal, oil and mineral, in distinction from deposits which are not large, is necessarily a matter of opinion. It seems to be well settled that mere exaggeration, expressed in vague and general terms, will not constitute fraud. See Kerr on Fraud and Mistake, page 82, and cases cited.

But no allegations of fraud, even if properly made, can, we think, avail the defendant. The plaintiff's contract is with the Buffalo Creek Oil Company. If the plaintiff has been guilty of fraud, a right of action against him has accrued in favor of the company. The plaintiff is certainly not liable to both the

company and the defendant. It is true, it is averred in one place in the answer that the conveyance was to be made to the defendant and other members of the company. It is also shown that the members were each to furnish, by cash or note, the same amount for the purchase of the land. From this it might be understood that the conveyance was to be made to them as joint tenants. But it is shown elsewhere that the conveyance was to be made to the company. Taking the averments altogether, it is evident that such was the agreement. It was to be made to the defendant in no sense except that he was a part of the company. The defendant's note, then, was given for the benefit of the company; the consideration moving to him was the interest which he acquired in the company, and if there was any fraud on the part of the plaintiff, the company alone is entitled to complain.

II. It is alleged as error that the court erred in rendering judgment against the defendant under the state of the pleadings. In the matter of submission, the record simply shows that the case was submitted to the court without a jury. It does not show upon what evidence, if any, it was submitted, and we conclude that it was either submitted upon the pleadings, or upon the evidence used upon the former trial. If it was submitted upon the pleadings, without evidence, the judgment is correct, for the execution of the note is admitted; and as to the other matters of defense, if they were allowable, the burden of proof was upon the defendant. If the case was submitted upon the evidence used upon the former trial the judgment must be held to be correct, according to the decision upon the former appeal.

It is claimed by the defendant that judgment was rendered *pro forma*, and no trial allowed, but, as we have seen, no different judgment could have been properly rendered, unless the defendant had other evidence to offer, and it is not claimed that he had.

III. The court rendered judgment for four hundred and fifteen dollars and sixty-five cents. In the petition the

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The State v. Brown.

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**3. PLEADING:** plaintiff asks judgment for only three hundred interest. and forty-five dollars, and interest and costs. The note is for two hundred and fifty dollars. At the time the petition was filed it did not, with accrued interest, exceed three hundred and forty-five dollars. Under the prayer for interest it was proper to include interest accrued since the petition was filed. *Butcher v. Brand*, 6 Iowa, 235.

**AFFIRMED.**

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**THE STATE V. BROWN.**

- 1. Criminal Law: EVIDENCE: CONFESSION.** A confession of the commission of a crime, when voluntarily and freely made, is entitled to the highest credit, and to the greatest weight as evidence.

*Appeal from Polk District Court.*

**SATURDAY, APRIL 20.**

THE defendant was indicted for the embezzlement of two hundred and seventy-eight dollars, in money, belonging to one Bowman. Upon a trial he was convicted, and sentenced to the penitentiary for one year. Defendant appeals.

*M. D. McHenry*, for appellant.

*J. F. McJunkin*, Attorney General, for the State.

ROTHROCK, CH. J.—I. Bowman was the general agent of the Washington Life Insurance Company, of New York. As such agent he collected the annual premiums due from policy-holders, and made monthly remittances to the general office. The defendant was employed by Bowman as his clerk and book-keeper. All the business between the company and Bowman was done in the name of Bowman, and defendant had no connection with the company, excepting as the employe of Bowman.

## The State v. Brown.

About April 1, 1877, the defendant was taken sick, and called a physician, who prescribed for him. As the physician was about leaving, defendant told him that he had a confession to make; that he had been taking money from the office. The physician cautioned him to stop, but defendant insisted on stating that for three or four months before that he had been taking money which was collected from policy-holders. He asked the physician if he thought Bowman would put him in jail, and what he thought he had better do. The physician replied that Bowman was a just man, and would not go beyond justice with him, and that he had better send for him, which he did.

Bowman went to defendant's room, where defendant made a voluntary confession to him, giving the particulars as to the manner in which he appropriated the money, and produced a pocket diary, and another small book showing the amount he had taken. These confessions were freely and voluntarily made on the defendant's own motion, without solicitation from any one. The books and accounts of the office showed that some one had been appropriating the premiums.

The defendant asked the court to instruct the jury as follows:

"Confessions alleged to have been made by the prisoner in the presence of the prosecutor alone, or in the presence of the prosecutor and one or more of his select friends, are the weakest of all testimony deemed competent in law, and should be received and considered as such, and confessions made in the presence of any one witness alone are deemed in law as weak and unsatisfactory, unless corroborated by other testimony."

This instruction was refused, and the court instructed the jury in these words:

"When it is shown that a public offense has been committed, free and voluntary confessions of guilt, or of facts necessarily tending to show his guilt, by the party accused, are, by the law, presumed to be true, and are entitled to the highest credit

and greatest weight as evidence of such fact or facts ; but such confessions will not warrant a conviction, unless they are accompanied by other evidence that the crime has been committed."

We think the instruction asked by defendant was properly refused. A voluntary confession of crime is not the weakest of all testimony deemed competent in law. It is true, evidence of a confession should be examined with care ; but when it is clearly established, whether made in the presence of the prosecutor or his friends, or to one person alone, if made voluntarily, it should not be regarded as weak and unsatisfactory.

The instruction given by the court upon this subject, when considered in the light of the facts of the case, was correct. The evidence, without conflict, showed a free and voluntary confession of the crime, with all its particulars. In such cases the confession is entitled to the highest credit and greatest weight as evidence. Wharton's American Criminal Law, 313 ; 1 Greenleaf on Evidence, § 215.

II. There was evidence introduced which tended to show that, at the time the defendant confessed the crime, he was sick, his mental faculties were weakened, and he was agitated and disturbed in his mind.

An instruction was asked that the condition of the mind of defendant should be considered in estimating the weight to be given to the proof of the confessions.

This was refused, but the court, on its own motion, instructed that the mental condition of defendant should be considered, "solely for the purpose of determining whether he had sufficient mental power, capacity and control to know what he was at the time saying, and whether such statements were freely and voluntarily made by him, and whether they were true."

There was no error in this action of the court. The instruction asked and that given are in substance the same. Counsel for defendant urges that there was evidence that the

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defendant's mind was impaired at the time the alleged criminal acts were committed, and that the court should not have limited the jury to a consideration of the condition of mind at the time the confessions were made.

No instruction was asked based upon the thought that defendant was insane when he appropriated the money. If such instruction had been asked we think it would have been properly refused, for want of evidence to make it appropriate to the case.

III. The defendant asked that the jury be instructed that he be found not guilty, unless it was proven that he embezzled the money of Bowman. This was refused, but the court did instruct the jury that if the money belonged to the life insurance company, and Bowman had no interest therein, or any part of it, then the allegation that the money was the money of Bowman was not sustained by the proof.

There was no error in this. The court gave proper instruction as to what constituted ownership of the money, and the evidence fully warranted the jury in finding that it was the money of Bowman. Considering the relation of the defendant to Bowman, and the relation of the latter to the life insurance company, the jury could not have fairly found otherwise than they did as to the ownership of the money. The judgment must be

AFFIRMED.

48	385
d107	300
107	560

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HAWKEYE BENEFIT AND LOAN ASSOCIATION V. BLACKBURN ET AL.

1. **Usury: BUILDING ASSOCIATIONS: INTEREST UPON PREMIUMS.** Building associations are not authorized by section 1186 of the Code to receive a greater sum per annum for interest upon their loans than ten per cent of the amount actually loaned. Where a note, bearing interest, was executed by a borrower to such an association, including not only the amount actually received by him, but also the premium paid for the loan, *held*, that it was usurious.

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Hawkeye Benefit and Loan Association v. Blackburn.

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*Appeal from Marshall Circuit Court.*

SATURDAY, APRIL 20.

THE plaintiff is a corporation, organized in March, 1870, under the general incorporation law, for the expressed object of "assisting the members of the association in the acquisition of freehold property, in the erection of buildings, and otherwise improving the same, and in the removal of incumbrances or liabilities upon property already held by them, and to enable them to receive the amount of their shares in advance, upon furnishing good mortgage security, as provided by the by-laws of this association, and to facilitate the accumulation, borrowing and redemption of capital." The capital stock was fixed at three hundred thousand dollars, and the shares were two hundred dollars each; the same was to be paid at the rate of one dollar per share each month.

It was provided in the articles of incorporation that certain fines might be imposed for non-payment of monthly dues, and dereliction of duties on the part of officers.

Such were the sources from which the corporation, in the first instance, obtained any money, and it was loaned to the member who would pay the highest premium therefor.

The theory of the organization was that in ten years, or less, the accumulations arising from the several sources of revenue would make the shares worth par, or two hundred dollars each, and whenever that period arrived, the assets were to be divided, and the corporation cease to exist. But in no event was it to exist longer than ten years.

The defendant became a member of such corporation, and subscribed for seven shares of the stock. After having paid his monthly dues for some time, he applied for a loan of fourteen hundred dollars, and the same was put up to be competed for among the members.

The defendant bid fifty-nine and one-half per cent premium, which being the highest bid, the loan was made to him; to

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secure which he gave the plaintiff a written obligation and mortgage to secure the same, and this action is brought to foreclose such mortgage. The defendant continued to pay his monthly dues, and the interest stipulated for when the loan was made, for some time thereafter, but finally he ceased to make any payments whatever.

The defendant, in his answer, alleged that the contract was usurious, and that he had paid more than was legally due thereon, and asked for an accounting, and that he be allowed his proportionate share of all the assets of the corporation as an "offset to the contract," and that the mortgage be declared satisfied and cancelled of record.

There was a reference, a finding of facts made by the referee, and his conclusions of law reported to the court, which report was confirmed, and the mortgage decreed satisfied, and judgment rendered in favor of the defendant for eighty-eight dollars and seventy-three cents, and against him, in favor of the school fund, for fifty-three dollars and fifty-five cents. The plaintiff appeals.

*Brown & Binford*, for appellant.

*O. L. Binford, W. E. Snelling, and Caswell & Meeker*, for appellees.

SEEVERS, J.—The abstract contains all the evidence, but the appellee objects that there cannot be a trial *de novo* in this court, because no motion was made at any time for a trial on written evidence. This objection is well taken. *Vinsant v. Vinsant*, 47 Iowa, 594, and numerous other cases.

Error, however, has been assigned, and the finding of facts is, perhaps, sufficiently full and complete to enable us to determine all the questions made by counsel which are of vital importance.

The obligation given by the defendant, and secured by the mortgage, is as follows:

1. USURY:  
building asso-  
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"\$1,400.

"On or before ten years from this date I promise



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**Hawkeye Benefit and Loan Association v. Blackburn.**

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to pay to the Hawkeye Benefit and Loan Association, of Marshall county, Iowa, the sum of fourteen hundred dollars, with interest thereon from the date hereof, at the rate of six per cent per annum, payable monthly, on the first Monday of each and every month, or on such other day as may be fixed upon by said association for the collection of monthly dues of its members. The principal sum of fourteen hundred dollars, and all interest accrued thereon, shall become due and payable whenever the interest shall be more than six months in arrears and unpaid; or, at the longest, at such time (not exceeding ten years) as said Hawkeye Benefit and Loan Association shall have accumulated sufficient assets, embracing moneys, property, and notes of like import with this, to divide to each of its members the value of two hundred dollars for each share held by him in the capital stock of said association; and the dividend so accruing to the maker of this note shall be then applied hereon in payment. This note is secured by mortgage on real estate.

"Dated at Marshalltown, Marshall county, Iowa, this 3d day of April, A. D. 1871.

"JOHN T. BLACKBURN."

The amount of money actually loaned was only five hundred and seventy-four dollars, and the referee found the contract to be tainted with usury. But this was more in the nature of a legal conclusion from conceded facts, than a finding of facts based on evidence which was in any manner conflicting. Such conclusion is the subject of review in this court.

Associations, incorporated or unincorporated, based on the same general principles as the plaintiff, have existed for some time both in this country and England.

In the latter they do not possess corporate powers, and the ruling there seems to be that such constructs as the one under consideration are not usurious, because the associations are mere partnerships, and the transaction constitutes a

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dealing in partnership funds. *Silver v. Barnes*, 6 Bing., N. C., 180; *Burbridge v. Colton*, 8 E. L. and E., 57.

It was so held, also, in *Shannon v. Dunn*, 43 N. H., 194; *Merrill v. McIntire*, 13 Gray, 157, and we do not doubt but that similar rulings have been made in other States. We believe it to be true that in neither New Hampshire nor Massachusetts was the association vested with corporate powers. Certainly this is true as to the former State. In Pennsylvania the contrary doctrine prevails. *William Tell Saving Fund Association*, 39 Pa. St., 137. In Connecticut such associations have corporate powers, and it was in substance held such contracts were usurious. *The Mechanics' and Workingmen's Mutual Savings Bank and Building Association of New Haven v. Wilcox et al.*, 24 Conn., 147. The same rule was adopted in *Baltimore Permanent Building and Land Society v. Taylor*, 41 Md.; *Mills v. Salisbury Building and Loan Association*, 75 N. C., 292; *Forest City United Land and Building Association v. Gallagher et al.*, 25 O. St., 208.

Without stopping to inquire whether there is any difference between an incorporation and an unincorporated association, it is quite apparent there is a conflict of authority, and that courts of the highest respectability are not in accord on this question. A critical examination of the various cases might demonstrate that this conflict is more apparent than real. Be this, however, as it may, we are fully warranted in establishing such a rule as seems to us to fully accord with the statutes and policy of this State.

The question whether this contract was usurious, under the statutes in force at the time the contract was made, need not be separately considered, because of a statute passed in 1872, which, it is insisted, has the effect to remove the taint of usury, if such ever existed. This statute forms a part of the Code, being §§ 1184, 1185, 1186 and 1187 thereof. It is there provided that corporations, to effectuate the same objects as those expressed in the articles of incorporation of the plaintiff, might be organized, and section 1185 provides and

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Mawkeye Benefit and Loan Association v. Blackburn.

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determines how and in what manner money may be obtained for the purposes of the corporation. If loans are made to members in strict accord with the provisions of the statute, it is expressly declared that such loans shall not be construed as usurious. Section 1186 is of a legalizing nature, and evidently intended to apply to such corporations as the plaintiff, and to contracts like the one in question. It provides that the loans of such corporations made in pursuance of their "articles of incorporation and by-laws," and the "notes, obligations and securities" taken therefor, "shall not be construed or held to be usurious, by reason of any fines or premiums for the right of preference in taking such loans, paid in addition to the *legal rate of interest*, but the same shall be valid and binding in all respects, the payment of such fines or premiums, in addition to a rate of interest *not exceeding ten per cent per annum payable annually*, or at any less period, notwithstanding."

The legal rate of interest cannot, in this State, exceed ten per centum per annum on the sum actually loaned. If any greater rate is charged or received, either directly or indirectly, the contract is usurious. Code, §§ 2077, 2078.

The amount of money actually loaned being only five hundred and seventy-four dollars, and the plaintiff, having charged and received as interest thereon for each month the sum of seven dollars, such contract is usurious, because interest thereon, at the legal rate, would only amount to four dollars and seventy-eight and one-third cents, if paid monthly.

There can be found in the statute no words which warrant the construction that interest might be charged or received on the premium bid for the money loaned. The language used forbids such construction, for the interest cannot thereunder exceed the legal rate. Before such an exaction in the shape of interest can be judicially sustained, the authority for it should be found unequivocally expressed in the statute.

Section 1185 of the Code is, in substance, the same as the Ohio Statute, and it was expressly held in *The Forest City*

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**Hawkeye Benefit and Loan Association v. Blackburn.**

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*United Land and Building Association v. Gallagher et al.*, before cited, that the Ohio Statute did not authorize a charge or payment of interest on the premium. It cannot be presumed the General Assembly intended to legalize contracts which the statute did not authorize.

We, therefore, hold the statute does not legalize or make valid the contract in question, because more than ten per cent per annum is exacted on the money actually loaned.

This view relieves us of the necessity of determining whether the legalizing statute is retrospective, and, if so, whether it is unconstitutional.

II. The referee found the defendant had paid on the contract, exclusive of monthly dues and fines, three hundred and thirty-six dollars, and as a conclusion of law that he was entitled to credit therefor on the sum actually borrowed. This result, in case the contract is found to be tainted with usury, is not, as we understand, seriously contested by appellant.

The referee also found the defendant was entitled to monthly dues to the amount of three hundred and twenty-six dollars and seventy-three cents, which he had paid to the plaintiff from time to time. In this way the result is reached that defendant is entitled to a judgment against the plaintiff.

It will be seen the written objection in no manner refers to the monthly dues, nor does the mortgage. If the interest is in arrears and unpaid for six months, the principal sum becomes due. But the non-payment of dues does not produce this, or any other result, so far as the contract is concerned. In other words, the payment of such dues is not secured by the usurious contract. Nor did the referee so find, but that the defendant was entitled to a credit for such monthly dues, under article 30 of the "constitution and by-laws" of the corporation, which is as follows:

"Members whose dues and penalties are all paid up, may, on one month's notice, withdraw from the association, and

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Hawkeye Benefit and Loan Association v. Blackburn.

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shall be entitled to receive back the money they have actually paid for monthly dues, deducting the proper proportion of all losses which the association may have sustained. Members wishing to withdraw, who have had loans from the association, must also first pay up the principal and interest due upon such loans."

The referee found that, at the time the defendant filed his answer and cross-petition, he was indebted to the plaintiff for monthly dues seventy-seven dollars, fines seven dollars and seventy cents, and interest on dues one dollar and fifty-seven cents.

According to the plain and explicit provisions of the foregoing article, before the defendant could sunder his connection as a member with the plaintiff, and receive back the money actually paid, he must have paid up all his dues and penalties. From the money so paid must be deducted his proper proportion of the losses, and he must also pay the principal and interest thereon of all money loaned him by the plaintiff.

Now, as he was in debt to the plaintiff for dues, penalties, and interest thereon, he was not entitled to withdraw from the corporation, and receive the money actually paid. There is no finding whether or not the corporation has met with any losses. We incline to think it should affirmatively appear it had not, before the defendant can recover back the whole of the money actually paid. Of course he was not under any legal obligation to pay the interest on the money borrowed, for none is due the plaintiff thereon. The defendant, therefore, did not have the right to withdraw from the association at the time he filed his answer, because he was then indebted to the association. For aught that appears in this case, the defendant may not be entitled to receive back anything by reason of losses. The amount due for dues and penalties must be paid, the losses ascertained, and, if any, the defendant's proper proportion thereof deducted from the sum paid, and the defendant is entitled to the residue, and has no future interest in the corporation.

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 Blair v. Blair.
 

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The cause is remanded to the Circuit Court for further proceedings in accordance with this opinion.

REVERSED.

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BLAIR ET AL. V. BLAIR ET AL.

1. Vendor and Vendee: CONTRACT TO CONVEY: WAIVER OF FORFEITURE.

Defendant entered into a contract to convey certain real estate, upon payment of the purchase price, as therein provided, the contract also providing that it might be declared forfeited by the defendant, in case any of the payments were not made at the times specified. Defendant afterward stated to the holder of the contract that he would not insist upon the forfeiture in case of default, and upon the strength of such statement the payments were allowed to become in arrears, and valuable improvements were made upon the property: *Held*, that the statement constituted a waiver of the right of defendant to declare a forfeiture, and that the holder was entitled to specific performance of the contract, upon the payment of the purchase money.

*Appeal from Boone Circuit Court.*

SATURDAY, APRIL 20.

AN action in equity, to enforce the specific performance of two contracts to convey land. There was a decree, after a trial upon the merits, dismissing plaintiffs' petition, from which they appeal.

*Hull & Ramsey and Montgomery & Scott*, for appellants.

*I. N. Kidder*, for appellees.

BECK, J.—In January, 1871, John I. Blair, who then held the title of the property in question, being two lots in Moin-gona, entered into a contract to convey them to Melissa Hutchinson, upon payments to be made at a future day. Mrs. Hutchinson entered into possession of the property, and made a payment of a part of the purchase money upon the execution of the contract.

1. VENDOR and  
vendee: con-  
tract to con-  
vey: waiver of  
forfeiture.

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Blair v. Blair.

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Under the express terms of the contract, Blair was authorized to declare it forfeited and enter into possession of the land upon the failure of the other party to make the payments at the times specified. Soon after the execution of the contract Mrs. Hutchinson assigned it to Atchison, who made valuable improvements upon the property, and on the 20th of September, 1871, conveyed an undivided one-half thereof to Henderson, taking a mortgage to secure the purchase money. The plaintiffs are the transferees of one of the notes secured by the mortgage, amounting to seven hundred and twenty-eight dollars and eighty-four cents, the other being paid. Henderson conveyed his interest in the property to Snedden, who is made a party to this suit. In February, 1874, plaintiffs purchased Atchison's remaining one-half interest in the property, and took an assignment from him of the contract executed by Blair. The improvements on the lots, consisting of a pottery, kiln, etc., worth three or four thousand dollars, were commenced about the time the contract was executed, and completed soon after. August 10, 1871, Blair conveyed the lots to the Moingona Coal Company. It appears that he was a stockholder and officer of that company, and held the title of the property in trust for the corporation. But it is not shown or claimed that he had not authority to enter into the contract for the sale with Mrs. Hutchinson. Indeed, the company must be regarded as assenting to his contract, as it claimed payment under the instrument, and at no time insisted that it was not entered into with full authority and right by Blair.

The payment not having been made in accord with the terms of the contract, the coal company, on the 24th day of September, 1872, declared it forfeited and annulled, of which they gave due notice to Mrs. Hutchinson.

It may be admitted, for the purpose of the case, that the coal company possessed full authority under the terms of the contract to declare the forfeiture, and that this could have been properly done under the facts of the case, unless the

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Blair v. Blair.

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right to do so had been waived by the defendants. This view of the case presents no other questions than those of law and facts arising upon plaintiff's claim that the right of forfeiture was waived.

It may be premised that forfeitures are not favored in chancery and will not be enforced in that court, but on the other hand chancery will not relieve against them when they are not unconscionable and in conflict with the rules of equity. It is also true that forfeitures, in contracts of this kind, may be waived by the parties entitled to enforce them, or such parties may be estopped, in a proper case, to enforce them. This doctrine is not, and we think cannot be, disputed.

We are of the opinion that the testimony in this case satisfactorily shows a waiver of the forfeiture, and that defendants are estopped from enforcing it. Mr. Blair, it is very clearly shown, before he conveyed the lands to the coal company, more than once declared to the plaintiffs, or those under whom they claim, that the forfeiture should not be enforced in case of a default in the payment. His agents made the same representations, of which the plaintiffs were informed, and, relying thereon, they were induced to delay payments. Indeed, it would seem that plaintiffs' assignors were pressed for means to complete the improvements on the lots and to carry on their business, and sought from Blair and his agents information as to their intentions to press the forfeiture, and were advised of the intention to grant them indulgence. They acted upon the declarations of intention they had from Blair and his agents, and did not make the payments.

The managing officer of the coal company is shown to have made similar statements of intentions to indulge plaintiffs' assignors. This he denies, but the preponderance of the testimony supports the claim of plaintiffs on this point. One of the plaintiffs and their assignor testify to these declarations of this officer, and this plaintiff states that, relying thereon, he expended a large sum of money upon the property. We think this point of fact is established by a fair



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Blair v. Blair.

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preponderance of the testimony. Equity will not enforce, in such a case, the forfeiture, but will regard it as waived, and hold the defendant estopped from setting up the default in the payments as a defense to the claim of plaintiffs for relief.

It is shown that plaintiffs made a tender of the amount due on the contract, and deposited the sum in the office of the clerk of the court.

The plaintiffs are entitled to a decree for the specific performance of the contract, so far as to fully protect their rights. The defendant, the Moingona Coal Company, will be required to convey to them the undivided one-half of the lots in controversy, and to defendant Snedden the other undivided one-half, unless the note secured by the mortgage which is held by plaintiffs be paid off and discharged; if that be done before the final decree is entered, it will not provide for a conveyance to Snedden of the undivided one-half of the property. Plaintiffs' interest in the undivided one-half of the property held by Snedden is secured by the mortgage. If that be paid, their right is terminated. If it be not paid, they ought to be secured in the enforcement of the mortgage, which cannot be done unless the undivided one-half of the property be conveyed to Snedden.

The decision of the court below will be reversed, and the cause will be remanded for a decree in harmony with this opinion.

REVERSED.

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Felt v. Turnure.

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## FELT V. TURNURE ET AL.

1. **Res Adjudicata: JUDGMENT UPON DEMURRER.** A judgment upon demurrer is a bar to another action between the same parties upon the facts, the sufficiency of which was put in issue by the demurrer.

*Appeal from Cerro Gordo District Court.*

SATURDAY, APRIL 20.

On the 20th day of January, 1870, Wm. Felt, one of the defendants, conveyed by warranty deed to F. J. Turnure, his co-defendant, the south-east quarter of section nineteen, township ninety-seven, range nineteen, Cerro Gordo county. In 1873 plaintiff, under a contract, furnished Wm. Felt money and property to the amount of about six hundred dollars. Other sums were advanced by him during the same year. To secure the payment of such advancements to the extent of six hundred dollars, in pursuance of an arrangement between plaintiff and defendants, F. J. Turnure conveyed by warranty deed the same land to A. S. Felt, and took from him, at the same time, a bond conditioned to reconvey the same land to Turnure on the payment by Wm. Felt of the sums of money advanced him under said contract.

On April 27, 1875, in the Circuit Court of Cerro Gordo county, plaintiff obtained a judgment against said Wm. Felt for money advanced on the above named security, of two hundred and sixteen dollars, and thirty-seven dollars and twenty-five cents costs, with a foreclosure of said bond, and special execution against the land described for said sum; and in the same suit, for money and property furnished Wm. Felt during the year 1873, plaintiff obtained a further general judgment against Wm. Felt for the sum of four hundred and fifty-five dollars and fifty-eight cents, and thirty-seven dollars and twenty-five cents costs.

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Felt v. Turnure.

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Plaintiff commenced this action to set aside the conveyance of 1870, above described, to F. J. Turnure, and to subject said land to the payment of the above named general judgment, claiming that said conveyance was fraudulently made, with intent to defraud prior and subsequent creditors, and that Turnure took and holds the land in secret trust for Wm. Felt's benefit, and for the purpose of placing and keeping it beyond the reach of creditors.

The defendants deny all the allegations of fraud and secret trust, and allege that Turnure was an absolute *bona fide* purchaser of said land for a full and valuable consideration, and that he holds said land as the absolute owner thereof. The defendants further claim that plaintiff became a creditor of Wm. Felt subsequently to the conveyance complained of, and with full actual notice of the same, and of all the relations between defendants in connection with said land. Appellants also plead that, in a former action between the same parties, the same issues of fraud and secret trust were tried and determined in favor of appellants, and against appellee, and said action and determination they claim as a bar to this action.

The court found that the defendant, Wm. Felt, has an equitable interest in the land in controversy, subject to principal and interest due on a mortgage executed by defendant F. J. Turnure to Caroline B. Smith, and also subject to a lien in favor of F. J. Turnure for one thousand five hundred dollars, and decreed that plaintiff have execution against said premises to satisfy the amount of his judgment against Wm. Felt, and that the premises be sold, subject to the lien of such mortgage and the claim of F. J. Turnure.

The defendant Turnure appeals.

*Hartshorn, Miller & Cleggitt*, for appellant.

*Goodykoontz & Wilber*, for appellee.

DAY, J.—On the 7th day of December, 1874, the plaintiff

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in this action commenced an action against the defendants herein, F. J. Turnure and Wm. Felt. The petition alleges that on the 24th of March, 1873, A. S. Felt, the plaintiff, was the owner of the south-east quarter of section nineteen, township sixty-nine, range nineteen, in Cerro Gordo county, and that on that day Wm. Felt gave to the plaintiff his note for six hundred dollars, due October 25, 1873, with interest at ten per cent, payable annually, and attorney's fees, if collected by law; that on March 23, 1873, plaintiff A. S. Felt gave to F. J. Turnure his bond, for the use and benefit of Wm. Felt, in penal sum of six hundred dollars, conditioned to convey said land to said Turnure on payment of said note. Plaintiff asks judgment for the amount of the note, interest, costs and attorney's fees, for a foreclosure of the bond and sale of the premises, and general relief.

The defendants answered, alleging that on and before March 24, 1873, F. J. Turnure was the owner of this land, and on said day he and his wife gave to plaintiff a deed therefor; that at said time it was agreed the deed was to be for security and a mortgage for certain sums to be furnished and advanced by plaintiff to Wm. Felt, estimated at about six hundred dollars, and for said sum said note was given as the estimated sum to be furnished, and said bond was executed on the condition, and under the agreement between the parties, that when defendant Wm. Felt paid and reimbursed plaintiff said advances to be made, the note was to be treated as paid, and plaintiff was to reconvey to defendant F. J. Turnure, and cancel said bond; that plaintiff, in summer and fall of 1873, furnished defendant Wm. Felt a team, reaper, wheat, and other articles of near six hundred dollars' value; that defendant Wm. Felt has paid plaintiff in full therefor, and paid said note. The defendant F. J. Turnure, in a cross-petition, asks that the deed be decreed a mortgage, and canceled as paid, and for a reconveyance of the land,

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and that plaintiff be barred from claiming any right therein, and for general relief.

The plaintiff thereupon filed the following amendment to his petition: "States the consideration of the note was advances effected and contracted to be made by plaintiff to defendant Wm. Felt, and said note was given as a continuous security for any balances due plaintiff for such advances to be made, until Wm. Felt reimbursed plaintiff for such sums advanced, and plaintiff advanced to Wm. Felt, in 1873-4, to the amount of one thousand six hundred and eighty-five dollars and twenty cents, and there is still due six hundred and fifty nine dollars and seventy cents. That defendant Wm. Felt is, and was at the time of making said note and bond, the true owner of said land, and the defendant Turnure held title to the same in trust for said defendant Felt, and said bond was made to said Turnure for the use and benefit of said Wm. Felt, and not otherwise." The defendants denied the allegations of this amendment. The plaintiff filed a second amendment to his petition, as follows: "Alleges that on ——— day of ——— 1870, and for ten years previous thereto, defendant Wm. Felt was and had been owner of said land, and at said time said Felt conveyed the same to defendant Turnure without any adequate consideration, and in collusion and with the design to hinder and delay the creditors of defendant Wm. Felt, and with intent that said Turnure should hold the title to the same in secret trust for the use and benefit of the defendant Wm. Felt, and to prevent said premises from being seized on the debts of said Wm. Felt, and said Turnure has no valid interest therein." The defendants demurred to this amendment on the following grounds:

- "1. That it does not present ground for equitable relief.
- "2. Petition shows plaintiff received from Turnure a conveyance of said land, and also shows that himself made bond to Turnure, and he is estopped from disputing his deed.
- "3. Pleadings do not show that he was misled or induced by misrepresentations to make the bond to Turnure."

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The decree rendered in that case is as follows: "Comes now the plaintiff and files second amendment, and after due consideration the court sustains demurrer. Plaintiff excepts. After hearing evidence and argument, it is found for plaintiff, and against defendants. It is decreed that plaintiff have and recover of and from the defendant Wm. Felt two hundred and sixteen dollars and sixty-six cents, with ten per cent interest and costs, thirty-seven dollars and twenty-five cents, and that the bond be foreclosed for said amount, and special execution to issue therefor; and further decreed that, on the payment of said sum and costs, F. J. Turnure will be entitled to a conveyance of the real estate, as provided in said bond, and further decreed that plaintiff have and recover of defendant Wm. Felt four hundred and fifty-five dollars and fifty-eight cents, interest at six per cent, and costs, thirty-seven dollars and twenty-five cents, and defendants except."

The judgment of four hundred and fifty-five dollars and fifty-eight cents, recovered in that action, is the one which plaintiff now asks may be declared a lien upon the property in controversy. The parties to the two actions are the same. The real estate involved in them is the same. The plaintiff, in the former action, asks for general relief, under which prayer he would be entitled to any relief consistent with the case made in the petition. The amendment alleges that the conveyance in question, the same as that involved in this action, was made to Turnure without adequate consideration, with the design to hinder and delay the creditors of Wm. Felt. The cause was pending in a court of equity, and it can not be doubted that the court had jurisdiction to declare any general judgment which it might render against Wm. Felt to be a lien upon the property in controversy. This being the attitude of the case, the defendant presented the legal question of the right of the plaintiff to any relief predicated upon the facts alleged in the second amendment to the petition. The court held that this amendment did not present ground for equitable relief. In so holding, the court must have

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been of opinion that the plaintiff had estopped himself from insisting upon the invalidity of the deed to Turnure, by accepting a deed from and executing a bond to him, or that plaintiff was not entitled to relief because he accepted the deed and made the bond, and advanced his money, with knowledge that the title was in Turnure, and, therefore, was not misled. It matters not upon what ground the court acted. The court then held that the fact that Wm. Felt conveyed to Turnure without consideration, with design to hinder and delay creditors, and with intent that Turnure should hold the title in secret trust for the use and benefit of Wm. Felt, did not entitle the plaintiff to any relief. This was an adjudication of that question by a court of competent jurisdiction. It stands yet unreversed, and we are unable to see why it is not conclusive of that question between these parties. The question has been once determined, and that determination, right or wrong, is a finality. That a judgment on demurrer will bar another action between the same parties on a cause involving the same facts see *Keater & Skinner v. Hock, Musser & Co.*, 16 Iowa, 23. See, also, *Freeman on Judgments*, § 255.

In this case relief is asked upon the same state of facts, substantially, as those held not sufficient to entitle plaintiff to relief in the former action. The judgment sought to be declared a lien is the same; the conveyance impugned is the same. It is alleged here, as there, that it was without consideration, with intent to hinder and delay creditors, and with intent that Turnure should hold the property in secret trust for the use and benefit of Wm. Felt.

Appellee claims, however, that the decree in the former suit showed that the issues were all found for plaintiff. If that is so, it is difficult to account for the institution of this suit. The decree taken altogether shows such not to be the case. The court found for the plaintiff so far as to hold that the note had not been fully paid as alleged by defendant, but the judgment, to the extent of four hundred and fifty-five dollars

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The State v. Henry.

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and fifty-eight cents was not declared a lien upon the property in controversy, and the effect of the ruling upon the demurrer was to hold that the plaintiff was not entitled to have it so declared a lien.

We think the former suit bars this action.

REVERSED.

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THE STATE V. HENRY.

1. **Criminal Law:** ALIBI: DEGREE OF PROOF REQUIRED. To establish an alibi it is not necessary that the jury should be "fully satisfied" of its truth.

*Appeal from Wapello District Court.*

SATURDAY, APRIL 20.

THE defendant was convicted of the crime of burglariously entering a dwelling-house in the night-time with intent to steal, and now appeals to this court.

*H. B. & L. C. Hendershott*, for appellant.

*J. F. McJunkin*, Attorney General, for the State.

ADAMS, J.—Evidence was introduced by the appellant tending to prove an alibi. Upon the subject of alibi the court gave an instruction, which is in these words: 1. CRIMINAL LAW: alibi: degree of proof required. "The defense is that the defendant is not the person who committed the crime, and, in addition, that the State has failed to show that he was the person. He has, in defense, given evidence tending to show that he was at another and different place from that where the burglary was committed, and at the same hour or time it was committed. If so, then he could not be guilty, and if, from all the evidence in the case, you believe he was, as claimed, at some other place, then he is entitled to your verdict of not guilty. It should



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be shown that the defendant was, at the very time of the commission of the crime, at some other place; but this fact can be established, like any other fact, by circumstances, or, as it is termed, by circumstantial testimony; so, when you have considered all the circumstances in evidence that you believe to be true, you will determine whether this claim of the defendant is true or not; but this defense is not required to be proved beyond a reasonable doubt, but you should be fully satisfied of its truth." We are of the opinion that the court erred in instructing the jury that they should be fully satisfied of the truth of the alibi. It was held in *State v. Hardin*, 46 Iowa, 623, that full satisfaction of the truth of the alibi was not necessary. We regard that case as decisive of this.

REVERSED.

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McDONALD v. WOODBURY COUNTY.

1. Sheriff: SERVICES OF JAILER. The sheriff who employs a jailer, and not the county, is liable for payment for his services.
2. ———: COMPENSATION OF. The salary provided by law to be paid the sheriff is intended as a full compensation for all services for which payment is not otherwise provided, and he cannot recover for services he may render as jailer.

*Appeal from Woodbury District Court.*

SATURDAY, APRIL 20.

ACTION at law to recover compensation for services as jailer, rendered by plaintiff. There was a judgment for the defendant. Plaintiff appeals.

*Marks & Hubbard*, for appellant.

*Geo. W. Wakefield*, for appellee.

BECK, J.—I. The petition alleges that plaintiff was

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appointed by the sheriff jailer for the county, of which defendant had notice, and for three months discharged the duties of the place. During this time a large number of prisoners were confined in the jail, and the service required the constant attendance of one man, and of an armed keeper whenever the doors of the cells were opened, and that the prisoners could not have been otherwise securely kept, and the services rendered by plaintiff could not have been performed by the sheriff, whose duties required frequent and long continued absence from the jail. The sheriff, prior to plaintiff's appointment, had notified the board of supervisors of defendant that a jailer was necessary for the safe keeping of the prisoners confined in the jail. The sheriff received no special allowance for guarding the jail, and his salary allowed by the supervisors, under Code, § 3789, was two hundred dollars per year. The services rendered by plaintiff as jailer are reasonably worth fifty dollars per month. It is further shown that plaintiff presented the board of supervisors a bill for his service, which was rejected, and payment refused. A demurrer to plaintiff's petition was sustained.

II. The sheriff has charge of the jail of the county, and is required to perform the duties of jailer. While  
 1. SHERIFF: services of jailer. he may discharge these duties by a deputy, or by one appointed by him to act as jailer, such deputy or jailer must look to him for compensation, as there is no statute providing compensation for such officers to be paid by the county. The sheriff's deputies cannot recover from the county for services, when there is no law allowing compensation to the sheriff for the same services. This cannot be doubted.

III. The sheriff, had he rendered the service for which plaintiff claims to recover, would have had no cause of action  
 2. ———: compensation of. against defendant. *Grubb v. Louisa County*, 40 Iowa, 314. The salary provided by law to be paid the sheriff is intended as compensation for all services for which payment is not otherwise prescribed.

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IV. All expenses and charges necessarily incurred in the safe keeping of prisoners in the county jail, except for the personal services of the sheriff and jailor, must be paid by the county. Code, § 4735. And when the sheriff is at expense transporting prisoners and the like, he can recover compensation. *Bringolf v. Polk County*, 41 Iowa, 554. In these cases compensation is not given for personal services in discharging the duties of sheriff or jailor. In the case before us, plaintiff claims for personal services which pertain to the duties of the sheriff, compensation wherefor is provided by the salary fixed by law. Plaintiff cannot recover under the statute or the case above mentioned.

**AFFIRMED.**

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CUTLER & PARKER v. MCCORMICK, HALL & PORTER.

1. **Mechanic's Lien: SUB-CONTRACTOR.** To entitle a sub-contractor, or a party furnishing a sub-contractor with materials, to a lien therefor, he must give notice thereof to the owner or his agent, and his lien attaches only to the extent of the balance due the contractor at the time of giving the notice.
2. ———: **ORDER: CONDITIONAL ACCEPTANCE.** Where, under a contract for the erection of a building, the contractor gave to a party furnishing material an order upon the owner, which was accepted by him conditioned upon the performance of the contract, *held*, that whatever the contractor became entitled to thereafter must be applied to the payment of the order.

*Appeal from Black Hawk Circuit Court.*

SATURDAY, APRIL 20.

On the 2d day of November, 1875, the plaintiffs filed in the Black Hawk Circuit Court a petition claiming of the defendants, McCormick, Hall & Porter, the sum of four hundred and twelve dollars and sixty cents, on account of building material furnished for the erection of a school-house for the

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independent district of East Waterloo, and asking the enforcement of a mechanic's lien upon said building therefor.

On the 7th day of March, 1876, Ricker & Lindley filed their petition of intervention as follows:

"1. That they are a copartnership; that on or about the 5th day of November, 1874, the defendants, McCormick, Hall & Porter, a copartnership, made and entered into a written contract with their co-defendant, the independent district of East Waterloo, a corporation existing under the laws of Iowa, to build, construct, and erect, a four-story brick and wood school-house, as per specifications attached to said contract, on real estate described therein, of which said district was then, and is now, the owner in fee simple, for the sum and price of sixteen thousand dollars, to be paid to said McCormick, Hall & Porter as follows: First, when the basement story was up, and the first story joists on, three thousand five hundred dollars; second, when the first story was up, and the second story joists on, two thousand two hundred dollars; third, when the second story was up, and the third story joists on, two thousand dollars; fourth, when the roof was on, composition, shingles, and dormer windows in, three thousand dollars; fifth, when the contract was fully completed and accepted, the balance, five thousand dollars.

"2. That in pursuance of said contract said McCormick, Hall & Porter entered upon the construction of said building, and in furtherance thereof on or about March 8, 1875, made a verbal contract with intervenors to furnish them with a large amount of lumber and material to be used in constructing said building. That in pursuance of said contract with McCormick, Hall & Porter, intervenors furnished a large amount of lumber, etc., and other building material used in the erection of said building.

"3. That on or about July 18, 1875, intervenors, fearing they would lose their claim against said contractors, filed a mechanic's lien upon said building and premises within six months from the date of furnishing same, for the materials so

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furnished, in the manner provided by section 2133 of Code, and act amendatory thereto, and immediately gave due notice to said McCormick, Hall & Porter and the said independent district of East Waterloo.

"4. That at the time of filing said mechanic's lien no other liens were filed against said premises and building, and said lien was the first lien thereon.

"5. That at the time of filing said lien the first three payments had been paid to McCormick, Hall & Porter, and there were yet remaining unpaid the last two payments above specified.

"6. That prior to filing said lien, and ever after the commencement of said building, said contractors had been short of money, and had repeatedly given orders upon said district in payment for work done and materials furnished thereon to them in the erection of said building, to be paid out of the next payment that should fall due to them, and that said orders had been invariably paid by said district when the payment and fund upon which drawn became due, and intervenors, at the time of the transactions hereinafter set forth, were knowing of the practice and custom of said contractors of giving such orders as aforesaid, and of their payment by the district as aforesaid.

"7 That after intervenors so filed their lien as above, and it became known to the men employed by said contractors at work upon said building, and those furnishing materials therefor, that said lien had been filed, they, including plaintiffs' and defendants' lienors, threatened to quit work and stop furnishing materials, unless said contractors caused intervenors' lien to be removed.

"8. That afterwards, and in order to prevent their men from quitting work and from stopping the furnishing of materials, and in order to prevent the work on said building from stopping, said contractors came to intervenors and proposed to give them orders upon the next payment which should become due, if these intervenors would release their

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lien so filed as above. That thereupon a computation was had of amount due these intervenors for such material, and found due three thousand nine hundred and fifty-two dollars and ninety-seven cents. That in consideration that intervenors would release their lien upon said building, so that the work on the premises could go on, defendants made and delivered to intervenors two certain orders upon said district and assignment of a part of said payments to be made, of which the following are copies:

“WATERLOO, IOWA, August 24, 1875.

*“To the Independent District of East Waterloo, and to the Board of Directors thereof:*

“Please pay to Ricker & Lindley two thousand four hundred and fifty-two dollars and ninety-seven cents, out of the fifth or last payment on the school-house building coming to us.

“McCORMICK, HALL & PORTER,

“by S. McCORMICK.’

“WATERLOO, IOWA, August 24, 1875.

*“To the Independent District of East Waterloo, and to the Board of Directors thereof:*

“Please pay to Ricker & Lindley the sum of one thousand five hundred dollars, out of our next payment on the school-house building.

“McCORMICK, HALL & PORTER,

“by S. McCORMICK.’

“9. That intervenors accepted said orders and assignments, and immediately gave notice thereof to said district, and thereupon released their mechanic’s lien upon said building and premises.

“10. That plaintiffs’ and defendants’ lienors, with full knowledge that the defendants had given to intervenors the orders aforesaid, and that the same were accepted, the district notified and their mechanic’s lien released, and that the amounts represented by said orders had been equitably

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assigned by said contractors out of the two last payments to intervenors, about the 7th of September, 1875, filed their mechanic's lien as charged in said petition, and are seeking by this action to foreclose the same to the amount said district was owing contractors at the time of filing their lien.

"11. That it was provided and agreed, in the contract and specifications above referred to between said McCormick, Hall & Porter and said district, that in case of any delay by the said contractors in providing the necessary materials, or deficiency of workmen to carry on the work on said building at any time, the said district might provide, at the expense of defendants, said contractors, all such materials or workmen, at such wages as the superintendent of construction of said building should deem proper, and the cost and charges incurred be retained from the contract as liquidated damages.

"12. That soon after plaintiffs herein and other defendants filed their liens against said building, and before said building was completed to the fourth payment, work was stopped on said building; said McCormick, Hall & Porter failed to provide the requisite materials and workmen to carry on the work on said building and complete the same, and that thereupon said independent district was compelled to furnish, and did furnish, the requisite materials and workmen to complete said building, as it had the right to do under said contract, and thereby necessarily expended the whole of the amount of the last two payments, except the sum of about six hundred dollars.

"13. That after completing said building, according to said contract, said independent school district would have owed and remained indebted to said McCormick, Hall & Porter, in case they had not given said orders, nor assigned the amount due to intervenors, in the sum of about six hundred dollars, which said sum said contractors had thereby assigned to these intervenors, and which, at time of filing of plaintiff's lien, was owing to intervenors, and at that time said district was not indebted to said contractors in any sum whatever.

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Cutler & Parker v. McCormick, Hall & Porter.

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"Prayer that the amount in the hands of said school district be paid over to intervenors, and that they have judgment therefor, and for general relief."

The plaintiffs demurred to the petition of intervenors, upon the ground that the facts stated do not entitle them to the relief demanded. The court overruled the demurrer, and the plaintiffs answered the petition of intervenors as follows:

"1. Admit the allegations in said petition contained in paragraphs one to five inclusive. Admit that intervenors took the orders mentioned in their petition, and released the mechanic's lien as alleged in paragraph eight. As to the truth of the further allegation in said paragraph, they have not knowledge sufficient to form a belief; but plaintiffs aver, and charge the fact to be, that a part of the verbal contract and agreement between said intervenors and McCormick, Hall & Porter, under which said orders were received by said intervenors, was that the same should be accepted by them, subject to certain conditions and stipulations indorsed upon the back thereof by the said independent district of East Waterloo, which conditions were as follows:

" 'WATERLOO, August 25, 1875.

"This order is accepted upon the conditions only that said McCormick, Hall & Porter finish the said school building in accordance with their contract, to such a stage as will entitle them under said contract to their next or fourth payment as therein expressed, and is payable only after this board has accepted and agreed to pay the amount on said building as completed to the stage aforesaid.

"[Signed] BOARD OF DIRECTORS IND. DIST. EAST WATERLOO,  
"by LEWIS LICHTY, Secretary of said Board.'

"And plaintiffs aver that said intervenors did accept said orders, subject to the stipulations indorsed thereon as aforesaid, and such stipulations became and were a part of said orders. That said McCormick, Hall & Porter never did in fact complete the school building in question to a stage that



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entitled them to demand or receive either of the payments mentioned in said orders, or in the stipulations or acceptance indorsed thereon, as above stated.

"2. Admit that intervenors herein released their mechanic's lien as stated in paragraph nine, but as to the further allegations therein they have not knowledge sufficient to form a belief.

"3. Admit that they filed their mechanic's lien as stated in paragraph ten, and that they had knowledge of the execution and delivery to intervenors of the orders set forth in their petition, and of their acceptance thereof by intervenors upon the conditions and subject to the stipulations contained in the indorsements upon the back thereof, and of the other allegations in said paragraph contained plaintiffs have not knowledge sufficient to form a belief.

"Admit the allegations in paragraph eleven of petition of intervenors. Admit that said McCormick, Hall & Porter suspended work on the building in question, but aver that such suspension occurred before the filing of plaintiffs' lien. Admit the completion of said building by said district, and expenditure of the moneys to become due on said contract, as charged in paragraph twelve of said petition."

The intervenors demurred to this answer upon the ground that the facts stated therein do not constitute a defense to the cause of action stated in intervenors' petition. The court sustained this demurrer, and the plaintiffs electing to stand upon their answer and refusing to plead over, the court rendered judgment against them for costs. The independent district of East Waterloo, having admitted the sum of six hundred and twenty-one dollars and six cents to be in its hands, and expressed a readiness to pay it to such person as the court might direct, judgment was rendered in favor of intervenors against the district for that sum.

The plaintiffs appeal.

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Cutler & Parker v. McCormick, Hall & Porter.

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*Boies & Couch*, for appellants.

*Alford & Elwell*, for appellees.

DAY, J.—The errors assigned are—*First*, the court erred in sustaining the demurrer of intervenors to plaintiffs' answer to their petition; *second*, the court erred in rendering judgment against plaintiffs for costs, on the trial of the issue of law made by intervenors' demurrer to plaintiffs' answer to their petition; *third*, the court erred in rendering judgment in favor of intervenors for the sum due from defendant, independent school district of East Waterloo, to defendants McCormick, Hall & Porter, and in deciding and adjudging that plaintiffs, upon the facts disclosed in the pleadings, were not entitled to judgment against said school district for the amount of their claim. These assignments are so intimately blended, that the case can be better decided by considering and determining the legal status and rights of the parties under the pleadings, than by disposing *seriatim* of the assignments of errors.

The petition of plaintiffs alleges that, of the material furnished by them to McCormick, Hall & Porter, two hundred and thirty-four dollars and eight cents in value was furnished between April 19 and July 18, 1875, one hundred and fifty-one dollars and ninety-one cents between July 18 and August 25, 1875, and one hundred and twenty-one dollars and fifty-three cents between August 25 and September 6 of the same year, and that on this account there is a credit of one hundred and five dollars and eighty cents. The petition also alleges that plaintiffs filed a mechanic's lien on said building, for the material so furnished, on the 7th day of September, 1875, and immediately gave written notice to McCormick, Hall & Porter, and said independent school district of East Waterloo, of the filing of such lien. Plaintiffs did not give notice to the said independent school district, before or at the time of furnishing the material, of their intention to furnish

the same, and the probable value thereof, as provided in section 2131 of the Code, as amended by chapter 49, Acts Fifteenth General Assembly.

The lien was claimed under section 2133 of the Code. This section, as amended by chapter 49, Acts Fifteenth General Assembly, is as follows: "Every sub-contractor, or person furnishing material, machinery or fixtures, or performing labor by virtue of a contract with a sub-contractor, may, at any time within six months after his labor is done or materials furnished, make a statement thereof in writing, supported by affidavit, that the same is just and true, and file the same with the clerk of the District Court of the proper county, and give notice thereof, with a copy of such statement, to the owner, his agent, or trustee, and to the contractor (or) sub-contractor; and from and after the service of such notice his lien therefor shall have the same force and effect, and be prosecuted in like manner, as a lien by the contractor, but shall be enforced against the property only to the extent of the balance due to the contractor, or sub-contractor, as the case may be, at the time of the service of such notice upon the owner, his agent, or trustee." While this statute provides that the lien shall be enforced only to the extent of the balance due to the contractor, or sub-contractor, at the time of the service of the notice, yet it is apparent that the object of the provision is to protect the owner from the payment of any sum greater than that contemplated in his contract. A construction of this section, according to its purpose and spirit, would doubtless permit the enforcement of the lien against any sum due from the owner, or thereafter becoming due, under his contract. The real question in this case then is, was anything due, or did anything become due, from the independent district, to McCormick, Hall & Porter, after notice of plaintiffs' lien on the 7th day of September, 1875?

Here it becomes necessary to notice the effect of plaintiffs' answer to the intervenors' petition. This answer admits most of the allegations of the petition of the intervenors, and

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Cutler & Parker v. McCormick, Hall & Porter.

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as to others of them it alleges that plaintiffs "have not knowledge sufficient to form a belief." This allegation tenders no issue, under the doctrine of *Manny & Co. v. French*, 23 Iowa, 250. It follows that all the allegations of the intervenors' petition are admitted, and that the answer thereto alleged no new fact, except as regards the conditional acceptance of the orders drawn in favor of intervenors by McCormick, Hall & Porter. From the allegations of the petition of intervenors the following facts appear: Before plaintiffs' lien was filed, McCormick, Hall & Porter had been paid the first three payments provided for in their contract, and they had drawn, in favor of intervenors, an order to be paid out of the fourth payment for fifteen hundred dollars, and one to be paid out of the fifth and last payment for two thousand four hundred and fifty-two dollars and ninety-seven cents. Before the building was so far completed as to entitle McCormick, Hall & Porter to the fourth payment, they failed to provide materials and workmen, and the district was compelled to complete the building, as it had a right to do under the contract, and in doing so necessarily expended the whole of the last two payments, except the sum of about six hundred dollars. It follows that, at no time after plaintiffs' lien was filed, did the independent district in question become liable under its contract for more than this sum of six hundred dollars. Did this become due to McCormick, Hall & Porter so that the plaintiffs' lien attached thereto? This question involves a determination of the effect of the orders drawn in favor of intervenors. These orders operated as an equitable assignment to intervenors of the sums named therein. When notified of the orders, the district became in equity bound to pay these sums when they became due to the intervenors. See 2 Story's Equity Jurisprudence, § 1044.

2 ———  
 order:  
 conditional  
 acceptance.

This equitable obligation would exist without any acceptance of the orders upon the part of the district. But it is claimed that the rights of intervenors are materially affected

Loomis v. McKenzie.

by the conditional acceptance. The conditions attached to the acceptance are the same as existed between the district and the contractors. Whenever the contractors became entitled to anything under their contract, to the extent of the sums named in the orders, intervenors became entitled to it under the acceptance. The intervenors furnished material for the erection of the building on which plaintiffs claim a lien, and their equities are just as good as those of plaintiffs. We think nothing became due the contractors upon which plaintiffs' lien attached, and that intervenors are entitled to the sum in the hands of the school district. See *Copeland v. Manton*, 22 Ohio State, 398; *Cahoon v. Levy*, 6 Cal., 295; *McCelpin v. Duncan*, 16 Cal., 126; *Blythe v. Poultney*, 31 Cal., 233.

The court did not err in sustaining the demurrer, nor in rendering judgment for the intervenors.

AFFIRMED.

## LOOMIS V. MCKENZIE.

48	416
116	287
48	416
123	206
123	207

48	416
139	368
140	499

48	416
7143	682
143	687
143	688

1. **New Trial: LOSS OF EVIDENCE: PRACTICE.** After trial and judgment, and an appeal therefrom had been perfected, all the written evidence upon which the case had been tried was lost, without fault of the appellant, who thereupon served a notice upon the other party and the clerk that he had withdrawn his appeal, and filed a petition for a new trial, which was granted: *Held*, that the new trial was improperly granted. ADAMS, J., *dissenting*.
2. ———: ———: **SUBSTITUTION OF.** Courts have the power to supply any part of their record which may have been lost, and this power exists independently of statute. In the exercise of their general equity powers they cannot grant relief by giving a new trial on account of lost evidence, when the law affords a plain and direct remedy by permitting the substitution of evidence.

*Appeal from Delaware District Court.*

SATURDAY, APRIL 20.

At the December Term, 1873, of the Delaware District Court, a decree was entered in this cause for defendant. On

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Loomis v. McKenzie.

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the 23d of December, 1875, the plaintiff perfected an appeal from the decree to this court. After the appeal it was discovered that all the written evidence upon which the cause had been tried was lost, without fault of plaintiff, and thereupon he caused a notice to be served on defendant and the clerk of the court, on the 17th day of February, 1876, to the effect that he had withdrawn his appeal, and on the same day filed a petition for a new trial. It shows the facts just stated, and alleges that the decree is contrary to law, is not supported by the evidence, and is excessive, and that the plaintiff is unable to supply the lost evidence without retaking the same, and that without it he cannot prosecute his appeal to the Supreme Court. Upon a hearing of this petition a new trial was granted. Defendant appeals.

*J. M. Brayton*, for appellant.

*A. S. Blair and C. E. Bronson*, for appellee.

BECK, J.—I. A demurrer to the petition was overruled. This decision is made the ground of an objection by defendant. Plaintiff insists that, as defendant did not stand on his demurrer in the court below, the objection raised will not be considered here. The question of defendant's right to dispute the correctness of the ruling on the demurrer in this court is of no practical importance. The demurrer strikes at the very right of plaintiff to the relief sought, on the grounds stated in the petition. All questions raised by the demurrer, therefore, will be considered in reviewing the action of the court in granting a new trial. The ruling upon the demurrer need not be considered.

II. Upon proof of the facts alleged in the petition, the court set aside the decree, and granted a new trial. Is this decree justified by the evidence and the law? The determination of this question demands our attention.

It is insisted by defendant that, by the appeal taken by plaintiff, the District Court was deprived of jurisdiction in the

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case, which could not be restored by the notice given to the other party and the clerk of the withdrawal of the appeal. As the case will be disposed of upon another ground, the questions presented in this position will not be considered.

We are brought to consider the correctness of the decision of the court below upon the facts of the case as presented by the record.

A dispute arises between counsel which relates to an amended abstract and a motion to strike out the same. The abstract shows that, in passing upon the question of plaintiff's right to a new trial, the District Court "found and decided that the decree was just and correct." The amended abstract shows that "it was not decided upon the trial (for a new trial) that the decree and judgment were just and correct." The correctness of the decree seems not to have been passed upon in granting the new trial.

The question as to the contents of the record before us, or rather what it should contain, we will not consider, for the reason that our conclusion will be the same whether we regard the record as presented either by plaintiff or defendant to be the true one. We will, therefore, consider the case upon the amended abstract, conceding, without deciding, that it is correct.

The question is, in this view of the case, brought within this narrow limit: Was the loss of the testimony upon which the case was tried, without fault of either party, sufficient ground for setting aside the decree and granting a new trial?

1. NEW TRIAL:  
loss of evi-  
dence: prac-  
tice.

It will be observed that the petition for the new trial was filed after the term at which it was rendered. The Code provides that this may be done, and the relief prayed for may be granted in certain cases. See section 3154. It is argued by plaintiff that, under the first and seventh paragraphs of this section, authority is found for the proceeding and order under consideration. The first is that new trials on petition may be granted "within the time and in the manner prescribed by

the section on new trials," being section 2837. The seventh is that new trials upon petition may be granted "for unavoidable casualty preventing the party from prosecuting or defending."

Section 2837 contains no provision applicable to the case before us. It cannot be so construed as to authorize a new trial on account of the destruction or loss, after trial and judgment in the court below, of the written evidence upon which the case had been tried, or for the loss or destruction of any other part of the record.

The seventh paragraph of section 3154 affords no support for the proceedings. It contemplates the case of "unavoidable casualty or misfortune preventing the party from prosecuting or defending." It cannot be said a party is prevented from prosecuting or defending a case by a matter occurring after judgment.

But it may be said he is prevented from prosecuting or defending an appeal in the case. But no such meaning can be put upon the language. It unmistakably refers to casualties which prevented the prosecution or defense at the trial upon which the judgment was entered. This view would be inconsistent, too, with plaintiff's theory of the case. He maintains that no appeal is pending in the case. If this be true, he cannot be entitled to the relief he asks, for there is no case pending on appeal from the decree which he can prosecute. Now there never can be an appeal if the relief be granted, for the decree will be set aside. But, if it be held that an appeal is pending, it presents but another horn of the dilemma. In that case the District Court had no jurisdiction of the case, and could not set aside the decree.

We fail to find any foundation in the statutes for the proceeding, and to authorize the relief granted therein.

III. It is argued that, if the statute provide for no relief, the District Court, in the exercise of its equity powers, could

2. —; —; set aside the judgment and order a new trial, to  
substitution  
 of secure to plaintiff relief from the consequences



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Loomis v. McKenzie.

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that would follow the loss of the testimony upon which the case was tried. That the court could grant relief to the party suffering on account of the loss of the written testimony cannot be doubted. If such relief would be secured by granting a new trial, it would impose hardship and probable loss on the other party, and relief for that reason could not be pursued in that way, certainly not when the same aid may be attained in a manner recognized by the law which would have no such inequitable results. It may be granted without prejudice to the interest and rights of the other party, by the exercise of the power conferred by law upon all courts of record, in a proper case, to supply their lost records by substituting new rolls.

The written testimony in this case which was lost constituted a part of the record. See Code, §§ 2742, 3184, 196. The power of courts to supply, in a proper case, their own destroyed or lost records exists independently of statute, and may be exercised whenever protection of the rights of parties demands it. See *Gammon & Deering v. Knudson et al.*, 46 Iowa, 455; Freeman on Judgments, § 89, and authorities cited. The law provides a plain and direct remedy for the plaintiff, in which his rights may be secured without prejudice to defendant. That remedy, and that alone, he can pursue in this case.

It is our conclusion that the proceedings in this case are not authorized by the law and the rules of equity. The order or decree granting a new trial is, therefore,

REVERSED.

ADAMS, J., *dissenting*.—I have no doubt that where the evidence in a case is lost after judgment, and before hearing in the appellate court, if either party desires to further prosecute or defend by appealing, the evidence should be substituted if it can be done. Where a copy of it has been preserved no difficulty could arise. Possibly, in some cases, it might be substituted, in the absence of a copy, by proving

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Loomis v. McKenzie.

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from the memory of witnesses what the evidence was. But in many cases this would be utterly impracticable. Only so much could be substituted as witnesses could remember of it. That would ordinarily be less than the whole, and oftentimes we may presume much less. The rights of either appellant or appellee would be exposed to great danger.

I think, therefore, that where the evidence in a case is lost after judgment, and it is impracticable to substitute it, and either party desires to further prosecute or defend his case by appealing, and the evidence was lost without his fault, the court may, in its discretion, grant a new trial. I think this is expressly provided for in section 3154 of the Code, subdivision 7. Where a person desires to prosecute or defend his case by appealing, and the evidence is lost after judgment, without his fault, and cannot be substituted, he is prevented from prosecuting or defending by unavoidable casualty. My associates consider that the prosecuting or defending a case by appealing is not prosecuting or defending it within the meaning of the statute. But no reason satisfactory to my mind is given for arriving at such a conclusion.

It is said that the plaintiff in this case maintains that no appeal is pending, and that that theory is inconsistent with the relief he asks; but I am unable to so conclude. He is not prosecuting his case by appeal, because he is prevented. He therefore asked and obtained an order for a new trial, not to enable him to appeal from the judgment rendered, but to enable him to further prosecute his case in the only direction in which it was practicable. The law designs, as I understand it, to provide that a person's right to prosecute his case should not be terminated until judgment shall be rendered in the appellate court. If he would otherwise be prevented by unavoidable casualty, it provides that a new trial shall be granted. I see no error in the ruling of the court below, and think that its order granting a new trial should be

**AFFIRMED.**

## ON REHEARING.

ROTHROCK, CH. J.—I. Within the proper time after the filing of the foregoing opinions in this cause a petition for rehearing was presented. A re-argument was ordered and the cause has again been submitted for our consideration. We have again carefully examined the original arguments in connection with the arguments upon the rehearing, and a majority of the court are satisfied that the former opinion, reversing the decree of the court below, is correct.

It is again insisted that a new trial was properly granted under subdivision 7 of section 3154 of the Code, for "unavoidable casualty or misfortune preventing the party from prosecuting or defending."

We desire to add but little to the former opinion upon that branch of the case. The unavoidable casualty or misfortune refers to something which transpired before the judgment was rendered which prevented the party from prosecuting or defending the action. It has no reference to prosecuting or defending an appeal from the judgment.

II. It is again urged that the granting of a new trial to supply the lost evidence was within the general equity powers of the court. In our judgment the fundamental error in this petition is that it ignores the rights of the successful party in the original action. However innocent he may have been in the matter of the loss of the evidence, it is claimed his decree should be set aside, and a new trial granted, to enable his adversary to supply the lost evidence. If the only effect of such new trial were to supply the lost evidence, the judgment of the court below might not be objectionable. It would leave the decree intact, to be reviewed upon appeal. But it does more than this. Upon the granting of a new trial, amendments may be made to the pleadings, new issues may be framed, and new evidence introduced; in short, the former decree must be ignored, and stand for nothing.

It is urged that the case is exceptional, and that the lost evidence cannot be supplied by substitution, because there is nothing from which to substitute.

The substitution of lost papers is an every-day practice in the courts of this State, and where no copies have been preserved it is usual, at least in case of lost pleadings, to allow substitution of others containing the substance of those which have been lost. It frequently occurs that, upon appeal to this court, some part of the record has been lost or mislaid. In such cases the practice is, upon a sufficient showing, to continue the appeal until a motion can be made in the court below to complete the record by substitution. It is not for this court to judicially determine that this cannot be done in any case.

The question is not before us for determination, and we do not decide it, but we can see no good reason why the court below, upon a sufficient showing, may not in any case order the evidence to be retaken if necessary to complete the record for the purpose of a trial upon appeal in this court. It is certain that courts possess the most ample powers to preserve their records, and to supply those which are lost or destroyed. But this power is radically different from setting aside decrees and judgments, and granting new trials.

We are asked to retain this cause, suspend the original decree, and direct that the evidence be retaken. This would be of no avail to the appellee. He withdrew his appeal more than two years ago. As we hold the loss of the evidence was not a sufficient cause to set aside the decree and grant a new trial, and that the decree is still in full force, there is no power or jurisdiction in this court to extend the time for taking an appeal.

48 424  
121 614  
121 617

## GRAY V. COAN ET AL.

1. **New Trial: PETITION FOR.** A petition for a new trial, under section 3155 of the Code, must be filed within one year from the date of the judgment or decree of the court in which the judgment or decree was rendered.
2. ———: ———. The time within which such petition must be filed commences to run from the date of the decree in the trial court, and not from the date of the affirmance of the decree in the Supreme Court.

*Appeal from Clinton Circuit Court.*

TUESDAY, JUNE 4.

THIS is a proceeding upon petition for a new trial. A demurrer to the petition was sustained, and plaintiff appeals.

*Daniel Gray*, appellant, *pro se*.

*George B. Young*, and *Chase & Monroe*, for appellee.

*Walter I. Hayes*, appellee, *pro se*.

BECK, J.—I. In October, 1873, plaintiff commenced an action in chancery to set aside a tax title held by defendant upon certain lots in the city of Clinton, on the ground of fraudulent combination at the sale, and for other reasons. On the 6th day of March, 1874, upon a trial on the merits, a decree was entered confirming defendants' title upon their cross-bill, and plaintiff's petition was dismissed. An appeal was taken to the term of this court held at Davenport, October, 1874. April 7, 1875, the decree of the court below was affirmed, and a *procedendo* issued accordingly.

The petition in this case was filed February 17, 1876. It asks for a new trial in the chancery case just referred to, and is based upon Code, §§ 3154 and 3157. Under these provisions a new trial may be granted in certain cases and for

specified causes, upon proceedings commenced within one year after judgment, by petition.

II. It will be observed that this proceeding was not instituted within one year from the entry of the decree in the District Court where the cause was originally prosecuted. The plaintiff is, therefore, too late, and a demurrer to his petition was correctly sustained.

1. NEW TRIAL:  
petition for.

III. But plaintiff insists that the limitation of one year provided by the statute for this proceeding, runs from the date of judgment of this court affirming the decree of the court below. Plaintiff asks for a new trial, not in this court, but in the court from which the appeal was taken. The judgment which he seeks to set aside was entered more than one year before his petition was filed. The statute provides that his petition shall be filed within one year after the judgment was entered which he seeks to disturb by his proceeding. This ends the matter, and leaves plaintiff without any right to prosecute his case.

One obvious reason may be mentioned in support of this conclusion. Appeals are prosecuted from final judgments of the court below. The plaintiff, by taking his appeal, admits that the judgment is final, and thereupon waives his right to prosecute this proceeding for a new trial. If this were not so, a party could, after a case was affirmed by this court, have a new trial granted below, which would be an unheard of proceeding. This court is required by the law to pronounce the final judgment in a case. To this end parties are required to bring their cases here in a condition to be so finally disposed of; they cannot hold in reserve a right to have another trial after this court has finally settled their rights by a decision.

**AFFIRMED.**

48	426
136	37

## PAINTER V. HOGUE.

1. *Res Adjudicata*: SPECIFIC PERFORMANCE. Where, in an action to compel specific performance of a contract, it had been determined that the plaintiff was not entitled thereto, it was *held* that the contract could not be set up as an equitable defense in an action to recover possession of the land which constituted the subject matter of the contract.

*Appeal from Muscatine District Court.*

TUESDAY, JUNE 4.

IN March, 1873, the plaintiff was the owner of a farm of one hundred and sixty acres in Cedar county. A verbal contract was entered into between plaintiff and defendant by which defendant agreed to exchange for said farm one hundred and eighty acres of land in Hancock county, and pay to plaintiff two thousand dollars in four equal annual payments. Plaintiff surrendered possession of his farm to the defendant. No other or further act was done by plaintiff in the way of executing the contract, and the defendant filed a petition in equity in the Cedar District Court to compel a specific performance.

The plaintiff answered said petition by averring that the said contract ought not to be enforced, because the defendant falsely and fraudulently misrepresented the location, quality and value of the Hancock county land, and prayed that the contract might be rescinded, and that he be put in possession of the farm in Cedar county, and for judgment against defendant Hogue for the rents and profits thereof.

The cause was referred, and a trial was had before the referee, who reported to the court his findings of fact and law. The conclusion arrived at by the referee was that there was inequality and hardship in the contract, and that it ought not to be enforced against plaintiff herein. The report con-

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Painter v. Hogue.

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cludes as follows: "I am forced to the conclusion that it is more equitable to leave the parties to the ordinary course of law, than to employ the extraordinary power of the court to enforce a contract that has in it all the elements of inequality and hardship that is contained in this. Whatever may have been the other representations made by plaintiff to defendant, he admits he represented the Hancock county land to be worth double its real value. He is seeking to make the defendant take it at that value. A court of equity cannot aid him in enforcing such a bargain. He must find his remedy in another form. In regard to the rescission of the contract prayed by the defendant in his cross-bill, I do not find that he is entitled to the relief sought. I therefore recommend that the petition and cross-bill be dismissed at plaintiff's costs, and that the parties be remitted to their remedies at law."

Exceptions to this report were overruled, and a decree was entered approving the report, and dismissing the petition and cross-bill, and remitting both parties "to their remedies at law." From this decree no appeal was taken. In March, 1876, the plaintiff, Painter, commenced this action at law to recover possession of the Cedar county farm, and fifteen hundred dollars for the rents and profits of the same. The venue of the cause was, by consent, changed to the Muscatine District Court.

The defendant, for an equitable answer and defense, set up the said contract for exchange, and averred that he was still in possession thereunder, and that he ever has been ready to perform and fulfill said contract and agreement on his part, and that he had tendered performance, and that his possession is rightful as the equitable owner of the land.

To this answer the plaintiff, by way of reply, set up the record and decree of the District Court of Cedar county, in the action for specific performance, and pleaded the same as an adjudication of the equitable rights of the defendant Hogue in the Cedar county farm.



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Painter v. Hogue.

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Defendant demurred to this reply, upon the ground, in substance, that it did not show an adjudication of the matters alleged in defendant's answer. The demurrer was overruled. The defendant appeals.

*Richman & Carskaddan and Holmes & Brooke*, for appellant.

*Richman, Broomhall & Jones*, for appellee.

ROTHROCK, CH. J.—It is unfortunate for these parties that the referee in the former action did not make a report determining all the issues presented, and settling the whole controversy. The court had jurisdiction of the parties and of the subject-matter, and in these latter days it is not the policy of the law to administer partial remedies.

We think the demurrer in this case was properly overruled. It was adjudged by the decree in the Cedar District Court that Hogue was not entitled to a specific performance of the contract. This was an end to his claim to the title of the Cedar county farm. He now sets up the same contract as an equitable defense, and while he does not ask, in terms, that the contract be specifically enforced, he seeks, what amounts to the same thing, to set up the contract as a complete bar to a recovery of the land by Painter, the holder of the legal title.

It is true the decree denied the claim of Painter for possession of the land, and for the rents and profits, but it also remitted both parties to their remedies at law. The exact position, then, was this: The legal title was left in Painter, and it was adjudged that Hogue had no equity in the land which he could enforce. When Painter asserted his legal title in this action the only defense Hogue could interpose was a better legal title.

**AFFIRMED.**

1. RES ADJUDICATA: specific performance.

Gordon v. Worthley.

## GORDON V. WORTHLEY ET AL.

1. **Fraudulent Conveyance: PROOF OF INSOLVENCY.** In an action by a creditor to set aside a conveyance of real estate as fraudulent, it is not necessary that an execution shall have been returned *nulla bona*, if the creditor shall allege, and otherwise prove, the fact of insolvency.
2. ———: **CONSIDERATION OF MARRIAGE.** Where a conveyance was made to a woman by a party who held the property as trustee for another, under an agreement of marriage between the grantee and the latter, who was at the time married to another, but who was subsequently divorced, and who afterwards carried out the agreement of marriage, *held*, that although the grantee might have been ignorant of the fact of her husband's insolvency at the time of the conveyance, yet it was, in fact, fraudulent, and should be set aside.

*Appeal from Cherokee Circuit Court.*

TUESDAY, JUNE 4.

**ACTION** to set aside a conveyance of real estate, as having been made to defraud creditors. The plaintiff holds a judgment against the defendant Sewell Worthley for seven hundred and fifty-two dollars. The land in question is eighty acres in Cherokee county, standing in the name of the defendant Eleanor Worthley, wife of Sewell Worthley. The land formerly belonged to him, and was conveyed to her through a trustee before her marriage, and while the plaintiff's action was pending. She avers that it was conveyed to her in consideration of her marriage, and that she was ignorant at that time that Sewell Worthley was indebted. Other facts are stated in the opinion. Decree for plaintiff. Defendants appeal.

*Eugene Cowles and W. J. Galbraith, for appellants.**Kellogg & Herrick, for appellee.*

**ADAMS, J.—I.** No execution has been issued upon the plaintiff's judgment, and it is contended by the defendant

48	429
84	354
48	439
92	429
48	439
101	43
48	439
105	644
48	439
108	104
48	439
111	461
48	439
140	385

## Gordon v. Worthley.

1. FRAUDU-  
LENT CONVEY-  
ANCE: proof of  
insolvency.

Eleanor Worthley that, such being the fact, the plaintiff should not be allowed to subject the land in question to the payment of his judgment. It was said, however, in *Postlewait et al. v. Howes et al.*, 3 Iowa, 383, that "if the creditor shall charge in his bill, and prove on the hearing that the debtor is, in fact, insolvent, and that an execution, if issued, must necessarily be returned unsatisfied, there is no reason for requiring him to go through the fruitless form of exhausting his legal remedy by return of execution no property found." While that question did not necessarily arise in that case, yet it appears to us that the rule announced is correct. The case of *Postlewait et al. v. Howes et al.* is referred to in *Gwyer v. Figgins*, 37 Iowa, 517, and its doctrine approved.

But it is said that the insolvency of the judgment debtor, in the case at bar, is not shown in any way. But in our opinion it is. Mrs. Worthley, in her testimony, says: "I was acquainted with his circumstances. I knew he had one hundred and sixty acres of land, one team, one cow, and some hogs." Evidence was also introduced showing that in Cherokee township, where he resided, there were assessed to him during the years 1873, 1874, 1875 and 1876 the same amount of property mentioned by Mrs. Worthley, and no other. There was evidence, also, that the records of deeds and mortgages of that county showed no other property in him. It is conceded that eighty acres of the land was exempt as a homestead. There was no evidence tending to show that he owned any property exempt from execution other than the eighty acres standing in Mrs. Worthley's name. A return upon execution of no property found would have been only *prima facie* evidence of insolvency. The evidence introduced was, we think, entitled to as much weight.

II. But Mrs. Worthley claims that she is a *bona fide* holder of the eighty, in pursuance of an ante-nuptial settlement.

2. ———:  
consideration  
of marriage.

Such settlements have been upheld, even when it was known to the wife that the husband was

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Gordon v. Worthley.

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indebted, the settlement not being grossly out of proportion to his station and circumstances. Jones' Appeal, 62 Penn. St., 324; *Brunnell v. Withrow*, 29 Ind., 123. In the case at bar, however, the settlement was grossly out of proportion to the husband's station and circumstances. He settled upon his wife all his property exempt from execution, and such a settlement certainly cannot be upheld, unless the marriage was not only the consideration of it, but was entered into by Mrs. Worthley in ignorance of her husband's indebtedness, and in ignorance of any circumstances which were sufficient to put her upon inquiry. Upon this point she says in her testimony that at the time of her marriage she was ignorant of her husband's indebtedness, and we see no evidence tending directly to show that she was not. We are well satisfied, however, that her husband intended to defraud the plaintiff, and that there were circumstances known to Mrs. Worthley which should have put her, as a prudent woman, upon inquiry. She found Worthley in possession of a quarter-section of land, one-half of which was exempt as a homestead, and the other half, the property in question, was standing in the name of one Gere. She derived her deed from Gere. Gere never claimed to own the property. Worthley claimed to own it, and dealt with her upon that ground. Gere's name was used as a cover, as she should have seen. It was not necessary to pass the title through a trustee to effect a marriage settlement, nor was it so pretended. Besides, the property was conveyed to Gere before Worthley had ever seen the defendant, who became Mrs. Worthley. It was conveyed to Gere October 28, 1873, and Worthley never saw her until November of that year. The title could not have been put into Gere's name in pursuance of any contract for a marriage settlement with her, and she should have known it. She must, we think, be regarded as affected with notice of Worthley's purpose in conveying to Gere, and that purpose was evidently to defraud the plaintiff. The conveyance was made, it appears, upon the day upon which the plaintiff brought his action to recover judgment.

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Gordon v. Worthley.

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Gere went through the form of paying money, yet it was talked between them that Gere should hold the title until Worthley should direct him to convey to some woman whom he might marry. The passing of money was not necessary for that purpose. That was done under a pretense of making an actual sale, the more effectually to conceal the property. When the unknown woman who was to receive the property in marriage settlement became known, it was conveyed to her. Now, while the circumstances known to her pertaining to the manner in which Gere held the title were, as we think, sufficient to charge her with notice of the character of the transaction between Worthley and Gere, the circumstances pertaining to her acquisition of the title were still more suspicious. It was conveyed to her November 20, 1873, and at that time Worthley was the husband of another woman, as both the parties well knew. Marriage, then, was not the consideration of the conveyance. It was conveyed to her wholly without consideration. She may have promised to marry Worthley, but such promise was not binding. The most that can be said is that she afterward married Worthley in consideration of being allowed to retain the property.

Whether a marriage can be a sufficient consideration to support a title, as against a creditor of a grantor, where the conveyance, when made, was without consideration, we need not determine. If it was made in this case in contemplation of marriage, as the defendants claim, then the indecent and inexcusable haste was sufficient to stamp the transaction with fraud. It seems probable to us, from the evidence, that the conveyance was made in contemplation that Worthley would bring an action and procure a divorce from the wife which he then had, and would marry the grantee. To say nothing of the immoral character of such a transaction, the question arises as to why the conveyance should be made in advance, not only of the marriage, but in advance of the procurement of the divorce from the other wife, and in advance, even, of the institution of a suit for a divorce. The transaction can have

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 Crum v. Boss.
 

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but one explanation, and that is, that it was deemed necessary to conceal the property. Its odiousness is too great to justify the belief that it would have been perpetrated without any supposed necessity for it. We think that the judgment of the Circuit Court should be

AFFIRMED.

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CRUM V. BOSS ET AL.

1. **Former Adjudication; PROMISSORY NOTE.** C. commenced an action, aided by attachment, upon an account and note, and asked that, if the attached property sold for more than enough to satisfy the claim in controversy, the balance be held, to apply upon another note of defendant held by him. The defendant admitted the execution of the notes, and claimed damages for the wrongful suing out of the attachment. There was a trial, and judgment for defendant: *Held*, in a subsequent action upon the second note, that the note was not in issue, and did not constitute a cause of action in the former suit.
2. ———: **EVIDENCE.** Under an issue of former adjudication, evidence is not admissible to show what action was taken by the jury, or what matters were considered by them.

*Appeal from Johnson Circuit Court.*

TUESDAY, JUNE 4.

ACTION on a promissory note executed in consideration of the sale of a "harvester," a lien on which was reserved or stipulated in the note. The defense pleaded was a former adjudication. A demurrer thereto having been sustained, the defendants appeal.

*Fairall, Bonorden & Ranck*, for appellants.

*Remley & Swisher*, for appellees.

SEEVERS, J.—In 1874 the plaintiff brought an action against one of the defendants—but, for the purposes of this case, it

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Crum v. Ross.

1. FORMER AD-  
JUDICATION:  
promissory  
note.

will be conceded to have been against both—on a note for eighty-eight dollars, an account for one hundred dollars and fifty-two cents, and on a note in all respects identical with the one now sued on except that it was due in September, 1874, while the note now in controversy was not due until September, 1875. An attachment was issued and judgment asked for three hundred and forty-three dollars and seventy-two cents, being, without serious doubt, the amount of the notes and account sued on, and interest, excluding the note sued on in this action. The petition in the former action then proceeded as follows: "Plaintiff further states that he is the owner of another note in all respects the same as the one last above set forth, except that the same is not due until September 1, 1875; that said notes were given for a 'Haynes Illinois Harvester,' and plaintiff is entitled to a lien on said harvester for the amount thereof. Plaintiff further asks that the said harvester be sold under special execution, to satisfy the amount due on said note given therefor, on which judgment is asked; that any surplus of such sale, after satisfying amount of such first note, be held to apply on the other note given therefor, when the same shall become due."

The defendants in that action admitted in the answer the execution of the notes and indebtedness sued on, and set up as a counter-claim an indebtedness due them by the plaintiff on an account, and sought to recover damages for the willful and malicious suing out of the attachment. To the answer there was a reply denying all the allegations thereof. There was a trial on the issues thus formed, and a verdict and judgment for the defendants. At the time of such trial the note sued on in this action had become due.

The answer herein alleges "that in and among the several causes of action in said petition (in the former action) contained was the note sued on in this action, and such reference was had thereto in said petition \* \* \* that issue was

joined on the said several supposed causes of action, counter-claims, and replies thereto."

The demurrer only admitted the facts well pleaded, but it did not admit conclusions based on the facts. The statement in the answer that the note sued on constituted a cause of action in the former suit is of the latter character. The pleadings in that action being made a part of the answer, we have the right to look into them, which being done, we readily arrive at the conclusion that said note was not in issue, and did not constitute a cause of action in the former suit. It is true its execution was admitted, and no defense was pleaded thereto, but the only relief asked was that the court should make an order directing that any surplus arising from the sale of the machine should be applied toward its payment.

The defendants did not see proper to contest the right of the plaintiff to such relief, by motion or otherwise, nor were they bound to take that course, as it was competent for them to object to the relief asked at any time after verdict and before judgment. It is unnecessary to determine whether the plaintiff was, or could have been, entitled to such an order. The attachment, as we understand, only issued for the claims due. Therefore the allegations in the petition, in reference to the note sued on in this action, must be regarded as surplusage. It is not claimed this case comes within the provisions of sections 2956, 2957, 2958 of the Code.

It is further alleged in the answer "that said cause (the former action) was submitted to the jury, and the said note  
 2. ———: evi- in this action sued on was \* \* offered in evi-  
 dence. dence both as a cause of action and ground of recovery, and to reduce or defeat defendants' counter-claim thereon; that the jury, in the determination of the question of indebtedness, \* \* considered the note sued on in this action, and in arriving at their verdict charged Boss with the full amount thereof, and allowed Crum the full amount of said note."



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Crum v. Boss.

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A judgment is only conclusive on the matters which are directly in issue, and not those which are brought incidentally into a controversy during a trial. 1 Greenleaf's Evidence, § 528. Ordinarily, the pleadings in a case constitute, make, define and limit the matters in issue. *Allen v. Newberry*, 8 Iowa, 65.

If, under the pleadings in the former action, the plaintiff could not obtain judgment on the note if introduced in evidence, and the proof entitled him thereto, it would seem necessarily to follow that no judgment could be rendered which would bar his right of action thereafter. It is wholly immaterial what the jury did, whether they allowed, disallowed, or considered the note in arriving at their verdict.

The only question is, did the note sued on constitute an issue in the former action. If the rule be established that the action taken by a jury determines what has been adjudicated, much uncertainty must prevail. Their action, whether right or wrong, can have no effect on the question presented.

Under forms of pleading that existed previous to the adoption of the Code of 1851 there was a general issue under which evidence could be introduced. It was always competent for the parties, under an issue of former adjudication, to prove by parol the matters evidence had been introduced to prove which were properly before the court under the general issue, and the judgment rendered was conclusive as to such matters. *Gardner v. Buckbee*, 3 Cow., 120. Where the matters in issue are involved in uncertainty by the pleadings, parol evidence is admissible as to the identity of such matters. *Stapleton v. King*, 40 Iowa, 278. But the rule never has been extended to the introduction of evidence showing the action taken by the jury, or what matters were considered by them. To do so might tend to the contradiction of the record, and this is inadmissible. If the effect sought by appellants is given to the introduction of the note as evidence, and the action of the jury alleged to have been had in reference thereto, the result would be the establishment of an issue

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Langdon v. The C., B. & Q. R. Co.

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not shown by the pleadings, and, if not directly contradictory, would be an addition thereto by parol evidence. We do not believe this to be permissible.

**AFFIRMED.**

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LANGDON v. THE C., B. & Q. R. Co.

1. **Damages: OVERFLOW.** In an action for damages for injuries caused by the overflow of plaintiff's premises, alleged to have been occasioned by the construction of dams by the defendant, it was *held* that plaintiff was not entitled to recover, because the evidence showed that plaintiff would have suffered like injury if the dams had been removed.

*Appeal from Monroe Circuit Court.*

WEDNESDAY, JUNE 5.

THIS is an action in equity for the abatement, as nuisances, of two dams, erected by the Burlington & Missouri River Railroad Company, upon a stream of water called North Avery, which flows across a corner of plaintiff's premises, and for two hundred dollars damages for injuries occasioned by said dams.

The cause was tried by the court upon depositions, and is triable here *de novo*. The court below dismissed the petition, and rendered judgment against plaintiff for costs. The plaintiff appeals.

*Dashiell & Andrews*, for appellant.

*Perry & Townsend*, for appellee.

DAY, J.—Without the aid of maps it is very difficult to obtain or to convey a correct idea of the situation of the premises. In the fall of 1869 the Burlington & Missouri River Railroad Company, under which

1. **DAMAGES:**  
**overflow.**

the defendant claims, built a dam across North Avery creek. In 1870 the plaintiff bought the premises in controversy, being about twenty-three rods in length from east to west, about eighteen rods in width at the eastern and wider end, and containing about two acres. North Avery creek enters said premises about midway of the west line, and leaves them about two rods east from the south-west corner, flows a few rods to the south, turns and flows to the east about six rods south of plaintiff's south line. In 1873 the plaintiff, at a cost of about two thousand dollars, erected a house, with a cellar thereunder, on the west half of the land in question, and six hundred and twenty feet above the dam. In 1874 plaintiff built a barn about midway of the north line of said real estate. Between the plaintiff's east line and the dam is a pond or bayou, on the north side of North Avery creek. A slough, about half a mile in length, running from the north, passes near plaintiff's north-east corner, and, running thence in a southerly direction, empties into this pond or bayou. Another slough enters plaintiff's land about two rods west of the barn, flows southeasterly between the barn and the house, leaves said real estate about six rods south of the north-east corner, and flows into the slough last above mentioned a short distance from the bayou or pond. Before the house was completed water came into the cellar, and a drain was constructed from the cellar to the slough running across the land in controversy, entering it about three rods from the barn.

In December, 1875, the defendant commenced the construction of another dam, four hundred and fifty feet below the one above mentioned. This dam was finished January 25, 1876. Its height is six and one-half inches less than the height of the first dam at its original construction. The height of the first dam was lowered when the second was built, so as to make the two dams of the same height. The plaintiff claims that the first dam flooded his premises in the summer of 1875; that in the spring of 1876, and since, the

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Langdon v. The C., B. & Q. R. Co.

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two dams have caused the waters of said creek and slough to overflow plaintiff's real estate, and flood his cellar, to his damage in the sum of two hundred dollars; that by means of the dams the bayou or pond has been filled with mud and deposit, and the water running in said slough has become obstructed so that it cannot flow into said creek, but is thrown back upon plaintiff's premises, flooding his cellar and garden, and tending to render plaintiff's habitation unsafe and unfit for a dwelling.

The evidence is so voluminous that it is not practicable to discuss it fully and satisfactorily within the reasonable bounds of an opinion. We are unable to find affirmatively that the injuries complained of by plaintiff arise from the construction of the dams in question. The evidence shows quite clearly that the top of the deposit in the bayou or pond is two feet higher than the crest of the dams. The evidence satisfies us that this deposit was occasioned, not from back-water from the dams, but from the washings coming down the two sloughs above spoken of, increased by bringing the surrounding country into cultivation. The deposit thus formed at the mouth and along the bed of the slough running through plaintiff's premises, has raised the point of the slough where the drain enters it, above the bottom of the cellar, and prevented the drainage of the cellar through the drain as already constructed. The deposit in the bayou or pond is not on plaintiff's premises, but on the premises east and a little south of him. The evidence further shows that the bottom of plaintiff's cellar is three and one-fourth feet above the crest of the dams. The width of the stream opposite plaintiff's premises is about twenty-eight feet. The width of the crest of the lower or narrower dam is fifty-nine and three-fourths feet. When the water rises three and one-fourth feet above the crest of the dams, so as to be on a level with the bottom of the plaintiff's cellar, we are unable to say from the evidence that the dams would be any obstruction to the flow of the stream, because of their great width as compared with the

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Borland v. McNally.

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width of the stream. If the dams do not, at that height, obstruct the flow of the water, it is clear that they would have no effect upon the overflow of plaintiff's premises. In 1869 the water washed the upper dam away, and flooded the entire premises in controversy, even running over the place where plaintiff's house now stands. The evidence shows that the stream often overflowed its banks before the dams were built, and that, if the dam was not there, the water would frequently rise within a few feet of plaintiff's house.

We feel quite well satisfied that the injuries which plaintiff has sustained arise from the undesirable location of his premises, rather than from any act of the defendant, and that, if the dams were removed, as plaintiff prays, he would not enjoy immunity from like annoyance and loss. The court did not, we think, err in dismissing plaintiff's petition.

**AFFIRMED.**

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**BORLAND V. McNALLY.**

1. **Practice in Supreme Court : ASSIGNMENT OF ERRORS.** When the record fails to disclose that the ruling objected to in the assignment of errors was made, the judgment of the court below will be affirmed.
2. ———: **ABSTRACT.** If the abstract fails to show that it contains all the testimony, the judgment will not be disturbed because it is not sustained by the evidence.

*Appeal from Muscatine Circuit Court.*

WEDNESDAY, JUNE 5.

ACTION to recover damages sustained on account of a road having been located upon lands conveyed by defendant to plaintiff by deed of warranty. There was a trial to the court without a jury, and judgment for defendant. Plaintiff appeals.

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Borland v. McNally.

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*W. F. Brannan and D. C. Cloud, for appellant.*

*Hanna, Fitzgerald & Hughes, for appellee.*

BECK, J.—The petition alleges that, in 1867, defendant conveyed to plaintiff, by deed of general warranty, certain lands in Muscatine county; that the covenants of warranty contained in the deed were broken by reason of a road having been, prior to the execution of the deed, established upon the lands conveyed; that the plaintiff had no knowledge of the existence of the road when the deed was executed by him; that defendant represented to plaintiff no such road had been established upon the lands; that defendant undertook "to pay plaintiff all damages he would sustain on account of said road, as well as moneys expended by him, should it be determined that the road had been located over the premises," and that the board of supervisors made an order for the opening of the road, and plaintiff instituted proceedings in chancery to restrain the opening of the road, wherein it was determined that the road had been, prior to the execution of the deed by defendant, legally established, and it was therefore ordered to be opened. The petition alleges that plaintiff sustained damages to the amount of two thousand five hundred dollars on account of said road, and has expended two hundred dollars in prosecuting the action instituted by him.

The defendant, in his answer, admits the execution of the deed, and denies all other allegations of the petition; he avers that, if the road has been established, it was by reason of agreements and acts of admission of plaintiff. The cause was submitted to the court without a jury upon oral testimony. No findings of facts or law were made.

Counsel for both parties denominate this as an equitable action in the title of the cause. We are unable to discover why this is done; it is shown by the pleadings to be purely a law case.

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 Borland v. McNally.
 

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If it be regarded as an equitable action it cannot be tried here *de novo*, for the reason that the testimony is not shown to have been reduced to writing under an order of court made in pursuance of Code, § 2742.

If it be regarded as a chancery case, not triable here *de novo*, or as a law action, it must be tried upon errors assigned upon the record, and under familiar rules prescribed by the statute, and frequent decisions of this court, we can only consider questions presented in an assignment of errors. But the only assignment of errors we find is to the effect that the court erred in holding—*First*, that a highway is not a legal incumbrance; and *second*, in rendering judgment for defendant.

The record does not show the ruling complained of in the first assignment of errors was made by the court, nor, indeed, can we determine upon what ground the decision was rendered. The abstract does not purport to give all the testimony, and, indeed, it clearly appears that all is not given. We cannot, therefore, hold that the grounds of the court's decision, or the decision itself, is erroneous. On the contrary, we must presume it to be correct, and that sufficient evidence was before the court to justify the conclusion reached, resulting in a judgment for defendant.

1. PRACTICE in  
the supreme  
court: assign-  
ment of errors.

**AFFIRMED.**

Gibbs v. Sawyer.

GIBBS v. SAWYER,

AND

GIBBS v. SEXTON &amp; SON ET AL.

1. **Tax Sale : REDEMPTION : STATUTE OF LIMITATIONS.** An action by the heir of a minor to redeem from tax sale must be commenced within one year after the death of the minor.

48	448
86	514
48	448
136	133

*Appeal from Dallas District Court.*

WEDNESDAY, JUNE 5.

CHARLES W. GIBBS was the owner of one hundred and sixty acres of land in Dallas county. His title dated from October 1, 1855. The taxes on said land were delinquent for the years 1857, 1858, and 1859, and at the tax sale for 1861 the same was sold for said delinquent taxes. On the 19th day of December, 1866, the treasurer executed a tax deed in pursuance of the sale. Appellants claim title under said tax deed.

Charles W. Gibbs was born September 26, 1849, and died September 28, 1869. Lucius H. Gibbs, the plaintiff herein, was his only heir and representative, being his father. On the 25th day of September, 1871, Lucius H. Gibbs commenced this action to redeem the land in controversy from said tax sale. The court below entered a decree permitting redemption to be made. Defendants appeal.

*Barcroft, Given & Drabelle*, for appellants.

*D. W. Woodin and Callvert, Macy & Smith*, for appellees.

ROTHROCK, CH. J.—It was provided, by section 779 of the Revision of 1860, that "real property sold under the pro-



Gibbs v. Sawyer.

1. TAX sale:  
redemption:  
statute of lim-  
itations.

visions of this act may be redeemed at any time before the expiration of three years from the date of sale; \* \* \* *provided*, that if real property of any minor, married woman or lunatic be sold for taxes, the same may be redeemed at any time within one year after such disability is removed, upon the terms specified in this section, which redemption may be made by the guardian or legal representatives." By chapter 173 of the Acts of 1862 this section was amended by omitting the words "married woman."

If Charles W. Gibbs had not died, his disability of minority would have been removed by his full age on the 26th day of September, 1870, and he would have been entitled to commence his action to redeem in one year from that time. This action was commenced by his father, as sole heir, within one year after his son would have been twenty-one years old. But Charles W. Gibbs died September 28, 1869, and the action was not commenced within one year of his death. The only question to be determined is, was the disability removed at his death, or did it continue in favor of his heir the same as it would have done to him if he had lived? The question is not free from doubt, but we think the disability must be held to have been removed by the death of the minor. Surely such would be the proper construction in case of the death of a married woman or a lunatic. In such case, if death does not remove the disability it would continue forever, for no one can determine when the lunatic would have recovered his reason or the married woman her rights as a *feme sole*. The policy and intention of the law is to give the owner of lands sold at tax sale one year to redeem, after the removal of the disability. There was no disability resting upon the father of Charles W. Gibbs when he inherited this land from his son. There was no disability of any one at the time Charles W. Gibbs would have been of full age. It could not, then, have been removed, for there was no disability to remove. Disability ceased when the ownership passed to an adult. The rule

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The State v. Julien.

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here announced finds support in *Whitney v. Webb*, 10 Ohio, 513, and in *Carey's Administrator v. Robinson*, 13 Ohio, 181. The authorities cited by counsel for appellee we think are not inconsistent with the conclusion which we have reached.

REVERSED.

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## THE STATE V. JULIEN.

1. **Criminal Law** : SALE OF MORTGAGED PROPERTY. Where a mortgage of personal property provided that if the mortgagor removed it from the county the mortgagee might take possession of and sell it, *held*, that a removal and sale of it in another State, under the circumstances stated, did not constitute an offense indictable in the county where the mortgage was executed.

*Appeal from Plymouth District Court.*

WEDNESDAY, JUNE 5.

THE indictment charges that the defendant, being the mortgagor of certain personal property, and the said mortgage being unpaid, did, at the county of Plymouth, wilfully and feloniously conceal, sell and dispose of said property without the consent of the mortgagee. The defendant, having been found guilty and sentenced, as provided by law, appeals.

*A. P. V. Day and I. S. Struble*, for appellant.

*J. F. McJunkin*, Attorney General, for the State.

SEEVERS, J.—It is provided by statute: "If any mortgagor of personal property, while his mortgage of it remains unsatisfied, wilfully destroy, conceal, sell, or in any manner dispose of the property covered by such mortgage without the consent of the then holder of such mortgage, he shall be deemed guilty of larceny, and be punished accordingly. Code, § 3895.

1. CRIMINAL  
law: sale of  
mortgaged  
property.

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The State v. Julien.

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Under this statute and indictment the defendant must have wilfully concealed, sold, or in some manner disposed of the property in Plymouth county, without the consent of the mortgagee, before he could be convicted.

The property was in that county when mortgaged, and the mortgage provides "that in case of default made in the payment of the above mentioned promissory note, or in case of my attempting to dispose of, or remove from the county of Plymouth, the aforesaid goods and chattels, or any part thereof, or when the said mortgagee shall choose so to do, then, and in that case, it shall be lawful" for the mortgagee to take possession of the property and sell the same, and apply the proceeds to the payment of the indebtedness.

We do not understand that the defendant would be guilty if he openly, and in the usual and ordinary course of business, removed the property from Plymouth county. The mortgage does not prohibit such a removal, and in the absence of such a provision such a removal would not be a concealment or disposal of the property. What the effect of such a provision would be we do not determine. By the terms of the mortgage in question the only effect of a removal of the property from the county is to give the mortgagee the right to take possession, and sell the property before the debt becomes due.

The defendant was rightfully in possession, and he did not sell it in said county, but he did so in the State of Kansas. and there was sufficient evidence that he took it from Iowa to that State, and that he crossed the Missouri river at "Decatur, Nebraska, a place not much frequented, and but few knew there was a ferry at that place."

It is claimed this is sufficient evidence of concealment. This may be admitted, and yet it does not follow any crime was committed in Plymouth county.

We take judicial notice of the locations and boundaries of the several counties in the State, and know that no part of said county is bounded by or touches the Missouri river. If, therefore, the defendant could lawfully remove the property

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The State v. Julien.

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from that county, the fact of the crossing the river at such place would have no tendency to show he concealed the property in said county.

It is true the property could not be legally sold, but the defendant cannot be convicted for a sale unless it was made in that county. An intent to sell, conceal, or dispose of, wherever formed, does not constitute a crime. It is difficult to see how a sale in Kansas can relate back so as to become a sale in Plymouth county in this State. Nor can a concealment at Decatur, Nebraska, or elsewhere, by relation, constitute and make a concealment in such county. Elasticity is an unknown quantity or quality in a criminal statute. *The State v. Lovell*, 23 Iowa, 304.

To conceal means to "hide, to cover up, to keep from sight;" and to dispose of property includes the foregoing, and to "sell, alienate," or to "put away." Now the evidence shows the defendant was engaged in threshing grain, and the property was used in connection with such occupation, in following which the defendant went from farm to farm as he could obtain employment. The mortgagee knew the defendant was so engaged, and he testified as follows: "I don't remember whether I gave him my consent to take the property out of the county. I don't know but I did give him my consent to take it to Sioux county, as he was threshing up there in that county. I think very likely I might have given my consent to go there, but nowhere else." This testimony makes it clear that the mortgagee consented that the property might be taken to Sioux county, and that it was taken to that county and there used in connection with defendant's business. If it was concealed or disposed of in that county the defendant should have been indicted and tried there.

There is no evidence tending to show where the defendant was when he started to Kansas. He may have been in either Sioux or Plymouth county. If the defendant started from either place and went to Kansas, and there sold the property without the consent of the mortgagee, we think this would

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The State v. Canada.

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amount to a concealment or disposal of the property in such county, for while so removing the property he was "hiding or putting it away."

We have read the evidence with care, and we are unable to find any which tends to show that the defendant started from Plymouth county when he went to Kansas, or that he, in any manner, concealed or disposed of the property in that county.

REVERSED.

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48	448
89	114
48	448
96	435

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THE STATE V. CANADA.

1. **Venue: CHANGE OF: CRIMINAL LAW.** While the determination of an application for a change of venue, based on local prejudice, is vested in the discretion of the court, yet it is not an absolute and arbitrary discretion, but a sound judicial discretion, subject to review in the appellate court.

*Appeal from Clarke District Court.*

WEDNESDAY, JUNE 5.

THE defendant was indicted, at the May term of the Clarke District Court, for murder in the first degree. At the same term he was tried, convicted of murder in the second degree, and sentenced to the penitentiary for twenty years. He appeals.

*Likes & Smith and P. J. Goss, for appellant.*

*J. F. McJunkin, Attorney General, for the State.*

DAY, J.—On the day after the indictment was presented, the defendant presented his petition for a change of venue, duly sworn to, as follows: "Your petitioner, Benton Canada, defendant in the above entitled cause, states to the court here that at the pres-

1. VENUE:  
change of:  
criminal law.

ent term of this court, to wit: May 23, 1877, he was indicted, by the grand jury of the said State and county, for the crime of murder in the first degree; that to the said indictment, so found, he here and now files his plea of not guilty; that this defendant cannot receive a fair and impartial trial, owing to the excitement and prejudice against him in this (Clarke) county. Your petitioner states his belief as to the particular grounds of excitement and prejudice to be: that the parents and relatives of the said Hunt, deceased (whom your petitioner is charged with having murdered), are old settlers of said county and State; that they are favorably known, and have and possess a very large and controlling influence over and among the people of said Clarke county, Iowa; that immediately after the alleged murder there were extended and uncalled for comments made and reflections cast by the public papers published in this county relative to said transaction, reflecting very seriously upon the character of this defendant in general, without any foundation whatever; that said strictures and reflections, so made by said newspapers, it is believed very firmly, greatly tended to arouse unduly the passions and prejudices, and very greatly excite the people of said Clarke county; that at least one of the public papers printed and published in Osceola, in said county and State, saw fit to and did publish extras of their said paper reflecting on the character of this defendant, which said charges and reflections were false *in toto*; that the excitement and prejudice against this defendant (he) firmly believes still to exist in the minds of the people of Clarke county, Iowa. Your petitioner firmly and religiously believes that the state of feeling against him is such, from the causes herein stated, and many others that might be stated, confidently appeals to and prays this honorable court for a change of venue in said cause, to the end that defendant may feel conscious that he is to, and will, receive a fair and impartial trial before his fellow countrymen who are free from excitement, prejudice, or in any manner biased whatever."

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The State v. Canada.

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In support of this application the defendant filed an affidavit of D. H. Clark, as follows: "I, D. H. Clark, upon oath depose and say that I am a resident of Clarke county, Iowa, and have been for about ten years; and that I am not related to the defendant in the case of *The State of Iowa v. Canada*. And I further say that the defendant, Canada, cannot obtain a fair trial in Clarke county, Iowa, owing to the excitement and the prejudice of the citizens of Clarke county, Iowa, against him. And I further say that I believe this is one of the cases in which the defendant ought to have a change of venue granted to him." Like affidavits of John N. Jamison and A. C. Rarick were filed. The State filed no counter affidavits, and made no showing in resistance of the application for change of venue. The court overruled the application.

The alleged murder was committed on the 17th day of January, 1877. The statute provides that the court, in the exercise of a sound discretion, must decide the matter of the petition, when fully advised, according to the very right of it. Code, § 4374. The statute vests in the court, not an absolute nor an arbitrary discretion, but a sound judicial discretion. If the discretion be improperly exercised, the action of the District Court may be reviewed and reversed. See *State v. Nash & Redout*, 7 Iowa, 347; *State v. Mooney*, 10 Iowa, 506; *State v. Arnold*, 12 Iowa, 479.

In the case of *State v. Nash & Redout*, *supra*, the following very appropriate language is employed: "It is important to maintain the usefulness of our judicial system, that no suspicion of influence from popular excitement in the administration of the law should be allowed to impair the public confidence in the fairness and impartiality of judicial proceedings. An excited state of public feeling and opinion is always the most unfavorable for the investigation of truth. Not only should the mind of the juror be wholly without bias and prejudice, it should not only be free from all undue feeling and excitement in itself, but it should be, as far as possible, removed from the influence of prejudice and feeling and

## Selz &amp; Co. v. Belden.

excitement in others. A circumstance of small importance in itself may often, in the midst of a community stirred by passion and excitement, serve to turn the scales of justice." Where so much is left to the judicial discretion of the court, precedents can be of but little aid. Each case must depend upon its own peculiar facts and circumstances. In this case, in view of the magnitude of the offense charged, the shortness of the time between its alleged commission and the trial, the particular circumstances of prejudice set forth in the petition for change of venue, and the fact that no counter showing was made by the State, we think that the court should have granted a change of venue, and that, in the refusal of it, the discretion vested in the court was not properly exercised. This disposition of the case renders a consideration of the other questions presented unnecessary.

REVERSED.

## SELZ &amp; Co. v. BELDEN ET AL.

1. **Attachment: EVIDENCE: INTENT.** Where the issue is the wrongful suing out of a writ of attachment, based upon the alleged sale of property to defraud creditors, the testimony of the attachment defendant respecting the intent with which he disposed of his property is not admissible.
2. ———: **RELEASE OF PROPERTY: EVIDENCE.** Where the sheriff releases attached property under a bond providing that the obligors shall be liable for any judgment that may be rendered, the property is nevertheless constructively in his possession so long as it is in the possession of the bondsmen, and parol evidence is not admissible to show that the property was in fact released to the owner thereof.
3. ———: **MEASURE OF DAMAGES.** The measure of damages in an action therefor, for the wrongful suing out of an attachment upon a stock of goods, is the cost of replacing the goods at the place where they were levied upon.
4. ———: **ATTORNEY'S FEES: PRACTICE.** In such an action the court may submit to the jury a special interrogatory inquiring whether or not the attachment was wrongfully sued out, and, if answered in the affirmative, the court may then receive evidence of the value of the attorney's services, and fix the amount to be allowed therefor.

48	451
84	721
84	720
48	451
88	542
48	451
96	300
48	451
103	150
48	451
144	152
144	153
144	163



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 Selz & Co. v. Belden.
 

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*Appeal from Jones Circuit Court.*

WEDNESDAY, JUNE 5.

THE plaintiffs' action is based on an accepted draft and account. They caused an attachment to issue on the ground that defendants were about to dispose of their property with intent to defraud their creditors. A stock of merchandise was seized under the writ of attachment.

The defendants denied the allegations of the petition, and, as a counter-claim, alleged that plaintiffs had no reasonable grounds for believing defendants were about to dispose of their property, as stated in the petition, and that the attachment was wrongfully and maliciously sued out, whereby they had been greatly damaged, for which they asked judgment. There was a verdict for the defendants and plaintiffs appeal.

*Remley & Ercanbrack*, for appellants.

*Pierce & Bush*, for appellees.

SEEVERS, J.—I. It was a material question whether the plaintiffs had reasonable grounds to believe, at the time the attachment was sued out, that defendants had  
 1. ATTACH-  
 MENT: evi-  
 dence: intent. disposed of their property with intent to defraud their creditors.

One of the defendants, being on the stand as a witness, was asked: "Were you, at or prior to the 24th day of May, 1876, disposing of your property for any purpose, or for what purpose?" He replied: "I was disposing of my property as fast as I could for the purpose of paying my debts; was making extra efforts, too." The admission of this evidence is assigned as error.

It has been held, and we incline to think the rule is pretty well established, where an action is brought to set aside a sale as being fraudulent against creditors, that the party charged with the fraud, when on the stand as a witness, may testify as

to what his intent in fact was, in cases where the evidence only tends to establish the fraud.

The rule is different in cases where the law conclusively presumes fraud from a certain state of facts. *Seymour v. Wilson*, 14 N. Y., 567; *Forbes v. Waller*, 25 Id., 430. But, in the present case, the object of the testimony introduced was not to set aside the sale, but to enable the defendants to recover on their counter-claim, because of the alleged fact that the attachment had been wrongfully sued out; the gist of the issue being whether the plaintiffs at that time had reasonable grounds to believe the defendants had disposed of their property with intent to defraud their creditors.

It was immaterial what the intent of the defendants in fact was; they may have acted with the utmost good faith. The true question is, had they so conducted themselves as to give the plaintiffs reasonable grounds to believe their intent was fraudulent?

It is evident, we think, the secret intent of the defendants cannot be admissible to establish this issue. All the facts and circumstances attending the alleged fraudulent sales were undoubtedly admissible, but the defendants could not testify as to their intent in fact.

II. The defendants claim they are entitled to recover such damages as they may have sustained by reason of the detention of the goods that were attached up to September, after they were seized, and the plaintiffs insist such damages should be limited to such as occurred up to the 26th day of the previous May.

The solution of these questions depends on the fact whether or not the sheriff surrendered the goods to the defendants on the 26th day of May. On that day Newland and Hakes, who are not defendants in this action or interested therein, executed to the sheriff a bond, whereby they bound themselves to "deliver the attached property to the sheriff, on demand, at the dwelling-house of said H. D. Newland, or pay the amount of said judgment and costs." By the use of the

2. ———;  
release of  
property.

words "said judgment" the parties meant any judgment that might be obtained in the pending action.

Where property is seized under an attachment proceeding, the sheriff must retain the same in his custody, to abide the judgment of the court, unless there is a statute under which he may relieve himself from such responsibility.

The Code, § 2994, provides that the sheriff may release or surrender the property attached to the defendant, if he causes to be executed a bond to the plaintiff to the effect that he will perform the judgment of the court.

It is not essential that the defendant should sign the bond. It is sufficient if he causes it to be executed. If given to the sheriff instead of the plaintiffs, this fact will not deprive it of its statutory character. *Moorman & Greene v. Collier*, 32 Iowa, 138. But it is essential the obligors should bind themselves absolutely and without condition to perform the judgment of the court. Before the obligors are liable at all on the bond in question they must have refused to deliver the property after due and proper demand is made on them. If they do so, then they are liable to pay the judgment.

The bond recites that the property was placed in the possession of Newland, and there is no provision in it which indicates the goods had been delivered to the defendants. The bond is the contract and must speak for itself. Looking at its terms and conditions we are satisfied the goods were placed in the possession of Newland as custodian for the sheriff, and that the damages of the defendants are to be measured by the length of time they remained in such custody. Evidence tending to prove the same was, therefore, admissible.

The appellants complain of the action of the court in refusing to permit them to prove the intention of the parties in executing the bond, and in allowing the defendants to do so.

The court should have construed the bond, and, in direct terms, told the jury what the rights and liabilities of the parties were under it. Evidence explanatory of the intentions of the parties was, therefore, inadmissible. Such evidence was

useless, as the written contract could not legally be in any respect changed thereby. But the plaintiffs were not prejudiced by the admission of the evidence, and the same may be said as to the sixteenth instruction, because our construction of the bond is in accord with what the jury must have found. These views in no manner conflict with what is said in *Budd v. Durall & Searcy*, 36 Iowa, 315.

III. The defendants introduced evidence tending to prove the value of the goods, which was objected to by the plaintiffs, and they now insist the evidence was inadmissible. Whether it was or not we do not determine, because, after a careful examination of the abstract, we fail to find that any exception was taken to the ruling, and the appellees insist that we cannot, therefore, determine this question. In this view we concur.

IV. The goods attached consisted of dry goods, boots and shoes, some groceries and furs. One Renger was introduced as a witness, and testified he was a merchant of some years' standing; that he saw the goods about ten days before the attachment issued, but did not take particular notice of them; and that he heard the testimony of the witnesses Belden and Newland; whereupon the defendants asked him the following question:

"Suppose this amount of goods were put into boxes in a damp room, and kept there from the 24th day of May to the 25th of September. Suppose they became musty, some are entirely worthless and damaged, and suppose dress goods got spotted, furs eaten by moths, shoes moulded, what in your opinion under a case of that kind, how much less were they worth on the 25th of September than on the 24th of May?"

And the witness answered: "The way these goods were handled, I should say twenty or twenty-five per cent." This evidence having been properly objected to, its admission is assigned as error.

Belden and Newland testified the goods were worth about one thousand four hundred dollars when attached; that they

were badly packed, and the room in which they were kept was damp; that some were damaged and some were not; that some dried fruit, and one or two other articles, were badly eaten by moths and worms. The total value of these articles did not exceed fifty dollars. There was no evidence tending to show to what extent the other goods were musty or moth-eaten. Under these circumstances, we do not think the witness was competent to speak in relation to the extent of the damages. At best, such testimony is somewhat unreliable. The witness did not see the goods after they were attached, and the evidence of Belden and Newland did not describe the extent of the injury sufficiently to enable an expert to form an estimate. The evidence did not rise to the dignity of a matured opinion; it was a mere guess, which one man could make about as well as another.

V. The goods, or some of them, had been on hand for some time, and a portion consisted of a bankrupt stock. The  
3. ———: measure of damages. defendants gave evidence tending to show they were worth twenty per cent more than the same goods in Chicago. The plaintiffs asked the court to instruct the jury "that the true measure of the value of the goods should be the cost of replacing them at the place where they were levied on." This was refused; it should have been given. The rule of the instruction would have fully indemnified the defendants, and this was all they could properly have asked.

The instruction was exceedingly favorable to the defendants, for the value of a stock of goods handled as these had been, in the way of retail trade, cannot be worth as much in the market as fresh, new goods would be.

It is true the defendants might have retailed them at twenty per cent over their cost, but this would have involved expense, and if these goods could have been so sold, certainly fresh goods could be at no greater expense.

VI. The nineteenth instruction is objected to because it authorizes the jury to infer from the facts and circumstances

appearing in evidence that the attachment was wrongfully and maliciously sued out, and failed to direct the attention of the jury to the rule that the attachment was not wrongful if the plaintiffs had reasonable grounds to believe the defendants had disposed of their property with intent to defraud their creditors. In previous instructions the court had directed the attention of the jury to the last named rule. We are not prepared, therefore, to say the objection now insisted on is well taken, although on another trial it would be proper for the court to add to the instruction "as heretofore explained to you." This would have the effect of calling the attention of the jury directly to the previous instructions.

VII. It seems to be conceded by counsel for appellants that the defendants are entitled to recover a reasonable attorney's fee if the attachment was wrongfully sued out. Section 2961 of the Code so provides where the action is brought on the bond, and that the amount of the fee "shall be fixed by the court." This is evidently a misprint. The original act or enrolled bill in the office of the Secretary of State provides the fee shall be *fixed* by the court.

The objection made to the action of the court is that evidence was introduced before the jury as to the value of the services, and the court said to the jury, in an instruction, the fee had been fixed by the court at one hundred and fifty dollars, and if they found the attachment to have been wrongfully sued out, they should allow the defendants such sum.

It is claimed that plaintiffs were prejudiced by this action of the court. But we do not concur in this view. As the jury have nothing to do with fixing the amount of the fee, the better practice, we think, would be not to introduce any evidence during the trial on that subject, nor should the jury be instructed in reference thereto. A special interrogatory should be propounded to the jury, the answer to which would indicate whether they found the attachment wrongfully sued out or not. If the latter should be found, evidence as to the amount of the fee would be unnecessary, and if the former

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The B., C. R. & N. R. Co. v. Verry.

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should be found such evidence could be introduced to the court and a finding made. The amount of the fee, as fixed by the court, should be added to or deducted from the amount found by the jury, as the case should require.

REVERSED.

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THE B., C. R. & N. R. Co. v. VERRY ET AL.

1. **Railroads:** JUDGMENT FOR PERSONAL INJURIES: LIEN. Section 1309 of the Code, making judgments for personal injuries prior to the liens of mortgages and trust deeds, cannot be extended to embrace claims for such injuries, even though actions therefor be pending, and the purchaser of a railroad takes it free from such claims, unless the same have been prosecuted to judgment. .

*Appeal from Benton District Court.*

THURSDAY, JUNE 6.

THE averments of the petition in this action, so far as necessary to an understanding of the questions involved, are in substance as follows:

The plaintiff, a railway corporation, was organized in June, 1876, and owns and operates a railroad from Burlington, Iowa, northwardly through Benton county, to the Iowa State line. Prior and subsequent to May, 1869, the Burlington, Cedar Rapids & Minnesota Railway Company constructed, owned and operated, as an entirety, said line of railroad, and continued to own and operate the same until May, 1875.

In May, 1869, the last named company executed a mortgage upon said line of road, including its franchise, right of way, road-bed, station houses, depots, rolling stock, etc., to secure the bonded indebtedness of said company, amounting in the aggregate to five and a half millions of dollars, which money was used in payment for the construction and equipment of said line of railroad.

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The B., C. R. & N. R. Co. v. Verry.

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In May, 1875, the said Burlington, Cedar Rapids & Minnesota Railway Company having made default in the payment of the interest on its bonded debt, upon the petition of the trustees named in said mortgage, all its property, including road-bed, rolling stock, station houses, etc., etc., was, by the decree of the United States Circuit Court, placed in the hands of a receiver for the use and benefit of the holders of the mortgage bonds, and in October, 1875, said property was, by the decree of said court, ordered to be sold.

On the 22d day of June, 1876, said property was sold under said decree of foreclosure to a committee who purchased the same for the benefit of all the bondholders, and on the 26th day of the same month, the said committee having assigned their bid and purchase to the plaintiff, said property was conveyed to the plaintiff in the same trust.

It is averred that, by virtue of said decree of foreclosure, and the sale and conveyance in pursuance thereof, plaintiff became the absolute and unqualified owner of all of said property, free and unincumbered, and its title thereto, and its rights and equities therein relate back to the date of said mortgage in 1869.

On the 3d day of June, 1873, the defendant Ernest Verry commenced his action against the Burlington, Cedar Rapids & Minnesota Railway Company, claiming damages for a personal injury received while in the employment of said company, in operating said road. Such proceedings were had in said action that, on the 15th day of March, 1877, said Verry recovered a judgment against said company, in the Benton District Court, for five thousand dollars. Said action was by ordinary proceedings, and the said last named company was the sole party defendant therein. The said Verry, without further proceedings, caused an execution to issue upon said judgment, and levied the same upon the depot and station grounds of plaintiff, including the railroad tracks thereon, situated at Vinton, in said Benton county, and certain of its rolling stock, while passing through said county.



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The B., C. R. & N. R. Co. v. Verry.

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It is further averred that said judgment is not a lien upon said property, and that the same is not liable to seizure upon said execution, and that plaintiff owns the same absolutely and unincumbered.

It is prayed that the defendant Smith, who is sheriff of Benton county, be enjoined from proceeding to advertise and sell said property in satisfaction of said judgment.

To this petition there was a demurrer, upon the ground that the statement of facts therein contained was not sufficient to entitle plaintiff to an injunction, nor to the relief prayed for.

The demurrer was sustained, and, the plaintiff refusing to plead over, the petition was dismissed. Plaintiff appeals.

*J. & S. K. Tracy*, for appellant.

*I. M. Preston & Son* and *N. M. Hubbard*, for appellee.

ROTHROCK, CH. J.—I. Section 9 of the act of the General Assembly of this State, passed April 8, 1862, was in these words: “Any judgment recovered against any railroad company in this State, for any injury to persons or property, shall be a lien, within the county where recovered, on the road, and real or other property of such company, and shall be prior and superior to the lien of any mortgage or trust deed which may be hereafter executed, except liens for taxes.”

This section was slightly modified and incorporated in the Code of 1873, as follows: “A judgment against any railway corporation, for any injury to any person or property, shall be a lien, within the county where recovered, on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed executed since the 4th day of July, 1862.” Code, § 1309.

Under the provisions of this statute a railway company may execute a mortgage upon its property, and a judgment for a personal injury sustained after the recording of the mortgage will be a lien prior and superior to the lien of the mortgage.

The purchaser of railroad mortgage bonds is required to take notice that his lien, although prior in time, must be postponed to judgments for injuries to person or property occurring at any time after the execution of the mortgage.

If Verry had recovered his judgment against the Burlington, Cedar Rapids & Minnesota Railway Company before the conveyance of its property to the plaintiff, by the foreclosure deed, there is no doubt the lien of the judgment would have been prior and superior to any right the plaintiffs have in the property. But we do not think a right of action, or an action pending, is a lien under this statute. It expressly provides that the *judgment* shall be a lien prior and superior to the mortgage. There is no lien until judgment. The statute makes the judgment a prior lien "on the road, and real or other property of such company," and "on the property of such corporation."

When the judgment was rendered—that is, when the point of time arrived at which the statute declares there shall be a lien—the Burlington, Cedar Rapids & Minnesota Railway Company had no property to which the judgment could attach as a lien. The title to all its property had passed to the plaintiff herein several months before that time.

It will not do to hold that the plaintiff was bound to take notice of the pendency of Verry's action. There is nothing in the statute charging plaintiff with such notice. As against the plaintiff, Verry must have a lien, if any, by virtue of his judgment, and not by reason of having an action pending when plaintiff became the owner of the property.

It is said by counsel for appellee that this statute "should be construed to mean the road and property owned by the corporation *when the injury happened*, and which was subject to a mortgage."

The difficulty under which appellee labors is that such a construction would be in plain and palpable violation of the unequivocal and explicit language of the statute, which excludes the idea of the *claim* being a lien.

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 Fauble & Smith v. Davis.
 

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It must not be forgotten that the action was purely personal. The Burlington, Cedar Rapids & Minnesota Railway Company was the sole defendant, and no relief was asked but a judgment. Third parties were, therefore, not bound to take notice of the pendency of the action, and before judgment had the right to purchase the property of the defendant in the action clear of any lien.

We think the demurrer to the petition should have been overruled. As this disposes of the case, it is unnecessary to examine the other questions argued by counsel.

REVERSED.

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 FAUBLE & SMITH V. DAVIS ET AL.

48	462
82	640
48	462
84	732
48	462
127	743

1. **Contract: PLEDING.** In an action upon a contract it is not competent to show that performance was waived. The plaintiff can recover only upon the contract sued on, and he cannot allege a performance and prove facts in excuse of performance.
2. ———: **MODIFICATIONS OF.** A party who contracts to erect a building according to certain plans and specifications, does not perform his contract by simply erecting a building equal in strength, value and convenience. To enable him to recover, any deviations from the requirements of the contract must be slight and unimportant.
3. ———: **BURDEN OF PROOF.** If the building was not completed within the time specified in the contract, the burden was upon the plaintiffs to show a valid excuse for their failure to perform the contract.
4. ———: **SEVERALTY.** The fact that one of the plaintiffs was to receive a certain fixed sum, and the other plaintiff another, did not render the contract several, and they could maintain a joint action thereon.

*Appeal from Pottawattamie District Court.*

THURSDAY, JUNE 6.

On the 16th day of July, 1874, the plaintiffs and defendants entered into a written contract, by which plaintiffs agreed to erect for the defendants a block of brick build-

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Fauble & Smith v. Davis.

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ings, according to certain written plans and specifications. The defendants were to furnish all the building materials. For the labor and mechanical skill in erecting said buildings plaintiffs were to receive a certain compensation, which was, as to amount and times of payment, set forth in the contract.

On the 17th day of March, 1875, this action was commenced. The petition contains three counts. The first count claims two thousand and fifty dollars as a balance due the plaintiffs upon the contract for the completion of the buildings. The second count claims four hundred and fifty dollars upon an itemized account for extra work not provided for in the contract. The third count claims two thousand dollars damages for the failure of defendants to furnish materials in the time and of the quality prescribed by the contract, and for failure to make the necessary excavations for the erection of said buildings.

The answer admits the execution of the written contract, but denies that plaintiffs performed the work according to the terms thereof, and denies that plaintiffs performed additional labor upon the building of the value of four hundred and fifty dollars, or any other sum whatever. Avers that defendants did furnish material of the kind, description and quality prescribed by the written contract, and the excavating to be done by defendants was performed in the time allowed in said contract.

Defendants, by way of counter-claim, demanded judgment against plaintiff for a large amount, for the alleged failure of plaintiffs to complete the building in the time and manner required by the contract. Plaintiffs, by reply, took issue upon the counter-claim set up in the answer.

Upon these issues there was a trial by jury. There was a verdict and judgment for the plaintiffs, and defendants appeal.

*C. C. Cole*, for appellants.

*Sapp & Lyman* and *James, Aylesworth & Mynster*, for appellees.

ROTHROCK, CH. J.—I. There are thirty errors assigned, and twenty-three points in the argument of counsel for appellant.

To pass upon each assignment of error is, in our judgment, unnecessary, because we think many of them belong to the same class and may be disposed of without separate consideration.

It appears that a part of the wall of one of the buildings was not as thick by four inches as provided in the contract, and that the windows in the basement story of one of the buildings were set lower than the plans provided, and that the work was not completed by the time stipulated.

The plaintiffs introduced evidence tending to show that these departures from the contract were either acquiesced in by the defendants, or caused by their acts, and that the buildings were accepted by them as being done in fulfillment of the contract.

This evidence was objected to by defendants, because not competent under the issues. The objections were overruled and the evidence admitted. The court instructed the jury as follows:

"1. In the first count of their petition the plaintiffs allege that they have performed their part of the contract, and that there is an amount due them thereon. Their right to recover on this count depends, then, on whether they have established their claim that they have performed their part of the contract. If the proof establishes either one of the following states of fact, the plaintiffs will be entitled to recover on this count—*First*, that they have performed all the work which they undertook to perform substantially in the manner and within the time in which they agreed to perform it; or, *second*, that they performed a portion of said work in the manner and within the time agreed upon, and were ready and willing to perform the balance according to the terms of the agreement, but were prevented from so completing the same by some act or omission of the defendants; or, *third*, that with

full knowledge of the manner in which the work was done, the defendants have accepted the same as a full performance of the contract by the plaintiffs. But if the proof fails to establish either of these states of fact, the plaintiffs cannot recover anything on this count of the petition.

"2. Your first inquiry, then, is whether the plaintiffs have performed the work they undertook to do in the manner and within the time in which they agreed to do it. What is required of them in the performance of the work is a substantial compliance, in the manner of doing it, with the plans and specifications. If they have deviated from the plans and specifications in matters which do not affect either the strength, value or convenience of the building, such deviation would be unimportant, and would not defeat their right to recover on the contract. But if in doing the work they have, on their own motion, so far departed from the plans and specifications as that the building is less valuable than it would have been had they followed the plans and specifications, they cannot, in this action, recover the balance which is unpaid under the contract, unless the defendants have accepted the work as done as a performance of the contract.

"3. If you should find from the evidence that plaintiffs performed the work actually done by them substantially as they agreed to do it, but that they have failed to do some portions of the work provided for in the contract, it will then be material for you to determine whether such failure was owing to any fault on their part. If they have omitted any material portions of the work which the defendants have not consented to or waived, or which was not caused by some failure of the defendants to perform some portions of the contract on their part, they cannot recover on said first count of their petition. But if they were ready and willing to do the omitted portions of the work (if there be any) and their failure to do the same was owing to the failure of defendants to furnish the necessary material for doing it, their failure to do such

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 Fauble & Smith v. Davis.
 

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omitted portions of the work will not defeat a recovery by them on the contract."

To the giving of which instructions defendants excepted.

The admission of the evidence above referred to, and the giving of these instructions, was erroneous.

The plaintiffs averred a performance of the contract, and it is well settled that under such averment it is not competent to show that a performance was waived, nor that the contract was altered by the act of the parties. A party cannot sue upon one contract and recover upon another. *Lumbert & Co. v. Palmer*, 29 Iowa, 104. For the latest utterance of this court upon the question, see *Edgerly v. The Farmers' Insurance Co.*, 43 Iowa, 587.

It may be conceded, as claimed by counsel for appellees, that "where a party to a contract is prevented from performing his part of it by the other party, he cannot therefore abandon it and sue on the *quantum meruit*, but is entitled to recover as in case of a complete performance." But it does not follow that, under our system of fact pleading, he can allege a performance of the contract, and prove facts in excuse of performance.

II. We think the second instruction is also erroneous in directing the jury "that a deviation from the plans and specifications, in matters which do not affect either the strength, value or convenience of the building \* \* \* \* \* would be unimportant, and would not defeat the right to recover on the contract."

A party who contracts to have a building erected according to certain plans and specifications cannot be compelled to accept any kind of a building which, in the judgment of others, is equal in strength, value and convenience. It may be of great importance to him to have the building to suit his ideas of convenience. It seems to us this instruction, if not intended to have that effect, would be liable to lead a jury to believe that any building of equal value, strength and convenience would fill the requirements of the contract, and that

the instruction should have been limited to slight and unimportant deviations.

III. The court further instructed the jury as follows: "14. The plaintiffs by the contract were to complete the building by the 1st of November, 1874, unless they were delayed by want of material. If they failed to complete said building by that time, and were not delayed by want of material, they would be liable for whatever damages the defendants have sustained by reason of such failure. The rental value of the building during the time which defendants were kept out of it, by reason of such failure, would be the measure of defendants' recovery on this claim. But the burden is on the defendants to establish both the fact of the failure and that it was not caused by want of material, in making out the claim." To which defendants duly excepted.

The latter part of this instruction was erroneous, even conceding that evidence in excuse of performance of the contract was competent under the issue. When the defendants established the fact that the buildings were not completed by the 1st day of November, 1874, as the case then stood, plaintiffs were in fault, and the burden was then on them to show a valid excuse for their failure to perform the contract.

IV. It is claimed by appellant that the contract is several, and not joint, and that plaintiffs cannot maintain a joint action upon it. In this position we do not concur. By the very terms of the writing, both of the plaintiffs are bound to the defendants for the entire work and labor necessary in the erection of the block of buildings. For any failure both are liable, and upon that theory the defendants set up joint counter-claims. The mere fact that Smith was to receive a certain sum of money for the work and labor, and Fauble a certain other sum, does not make it necessary that they should bring separate suits.

There are other errors assigned, among which is the ruling of the court upon evidence as to the acceptance of the build-



Shaw v. Heisey.

ings, and as to what is extra work, etc., which we do not deem it necessary to determine, as upon a new trial it is not likely the same questions will arise.

For the errors above discussed the judgment must be

REVERSED.

## SHAW V. HEISEY ET AL.

1. **Mortgage: FORECLOSURE: JUNIOR LIEN.** Where a mortgage has been foreclosed in an action to which a junior lien-holder has not been made a party, the purchaser under the foreclosure proceeding may prosecute an action requiring the junior lien-holder to exercise his right of redemption, and in default thereof is entitled to a decree cutting off such right of redemption.
2. ———: **EXECUTION: JUDICIAL SALE.** The interest sold under execution in a foreclosure proceeding is the entire interest covered by the mortgage, unaffected by any subsequent conveyance of the mortgagor.

*Appeal from Jones District Court.*

THURSDAY, JUNE 6.

ACTION in chancery to quiet the title of certain lands in plaintiff. There was a decree dismissing his bill, from which he appeals. The facts of the case appear in the opinion.

*Remley & Remley*, for appellants.

*Thompson & Davis*, and *Keeler & Keeler*, for appellees.

BECK, J.—I. The petition shows that plaintiff is the owner of certain lands in Jones county. The conflicting titles of the parties are traced from David Graham, who, in 1864, conveyed the lands to Phillip Haines. Haines executed a mortgage upon the lands to Graham, which was assigned to E. A. Vaughn, who subsequently conveyed the undivided one-

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Shaw v. Heisey.

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half of the property to Winslow, who conveyed a like interest to Lewis. Lewis executed a mortgage upon his interest in the property to Winslow, which was foreclosed. Under this foreclosure plaintiff acquired title. It does not appear that defendants, or those under whom they claim, were made parties to the action.

Vaughn foreclosed the mortgage executed by Haines to him, and became the purchaser of the land upon a sale thereof, under an execution issued upon the decree of foreclosure. The plaintiff, and those under whom he claims title, were not made parties to this foreclosure proceeding. Subsequently, Vaughn instituted another action, to which plaintiff and others were made defendants, and a decree was had which foreclosed their equity of redemption.

Plaintiff executed a quitclaim deed for the lands to Vaughn, who subsequently conveyed the property to defendant Heisey.

II. Plaintiff represents that the quitclaim deed executed by him to Vaughn was made to describe, through mistake, the lands in controversy, and asks that it may be reformed so as to conform to the true intentions of the parties.

It becomes unnecessary to consider this branch of the case, as the rights of the parties are fully determined by the conclusions we reach touching the effect to be given to the proceeding instituted by Vaughn to cut off the equity of redemption of plaintiff.

III. After the sale of the land upon Vaughn's foreclosure, purchasers under the mortgage, who were not made parties—

1. MORTGAGE: and plaintiff was in that condition—had the right  
foreclosure: of redemption. As they were not brought into  
junior lien. court and required to answer to the action, their rights were not cut off; these rights were to redeem from the mortgage, and no other or different. See Withrow and Stiles' Dig., pp. 752, 765, for cases upon this point. These rights they could enforce by action. The purchaser under the foreclosure proceedings was authorized to prosecute an action requiring them to exercise their rights of redemption, and, in default thereof,

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Shaw v. Helsey.

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to demand a decree foreclosing, cutting off, their equity of redemption. In such an action they could set up their equity of redemption, and their right would be as fully enforced as it could have been in the original foreclosure proceedings, had they appeared and pleaded therein. If, however, they failed to appear, their right of redemption would, by a proper decree, be just as effectually foreclosed as it could have been in the original decree of foreclosure. These are familiar doctrines, and do not demand the citation of authorities to gain assent to their correctness. We must now inquire if plaintiff's rights have been cut off by the last action for the foreclosure of his equity of redemption.

The petition in the action brought by Vaughn shows that the defendants, among whom was Shaw, "have, or claim to have, some rights, claims or interest in said land, to-wit: judgment and mortgage liens, to what extent plaintiff is unable to state—but plaintiff says that each and every one of said claims, liens and interest were and are junior and inferior to the judgment and foreclosure obtained as aforesaid by him, and to satisfy which said property was sold, as before stated." The decree contains the following adjudication: "It is therefore finally ordered, adjudged and decreed by the court that the right and equity of redemption of said defendants, and each of them, of, in and to the premises described and set forth in plaintiff's petition, to-wit: [describing the lands], be foreclosed and forever barred, and that plaintiff's title thereto become and remain absolute and free from all liens and judgments which defendants or either of them have or had against said land, and that the same are junior and inferior to plaintiff's title thereto."

The right which Shaw had, as against the senior mortgage, was the right of redemption, and thereby to subject the land to his debt. He did not hold the title. His right therein was that of the holder of a lien inferior to Vaughn's mortgage. He made default in the action, and thus admitted the allegation of the petition. The decree sufficiently provides that his

right of redemption should be cut off and declared inferior to plaintiff's title.

IV. The record shows that the return of the sheriff upon the execution, and the sheriff's deed, describe the property sold and conveyed to be "Haines' interest" in the land in controversy. It is argued that the undivided one-half only of the land was conveyed, as Haines had parted with the remaining interest. But Haines, when he executed the mortgage, owned all the land; that instrument covered all the interest he then held. The mortgage was not affected by subsequent conveyances. The "interest of Haines," conveyed in the sheriff's deed, was the interest he conveyed by the mortgage.

V. The judgment and decree against Haines were entered upon agreement, whereby the property was to be sold upon execution, subject to redemption.

Plaintiff insists that as he was interested in the amount of the judgments this agreement was to his prejudice, and that he had the right to have the real estate of Haines exhausted before plaintiff's land could be sold. His rights, he claims, so far as they were affected by these matters, were not protected. But the ready answer to this objection is this: Whatever right he had could have been protected and enforced in the proceeding in which he was made a party. The judgment upon which the land was sold did not bind him, for he was not a party thereto. He could, therefore, have shown that it was for a sum greater than was actually due upon the mortgage. Had he the right to require the undivided half not conveyed by Haines to him to be first sold, and he was prejudiced because this had not been done, he could have shown these facts in the action brought against him, and whatever rights he held could have been fully enforced. But, by his default, he admitted that he held no equities of this character.

VI. Shaw held certain judgment liens against Haines. His counsel now insist that the decree in the action brought against him cut off his right to redeem under these judg-

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ments, and not his right under the foreclosure of the mortgage given by Lewis.

But as Vaughn was not a party to that foreclosure proceeding, he and those claiming under him were not bound by it. Shaw acquired no title thereby as against Vaughn and his grantees. When Vaughn brought his action against Shaw, the case was simply that of a contest of a senior mortgage against a junior. The junior's right was that of redemption and no other. He could have claimed that right, not on the ground that he held the title against Vaughn, but under his mortgage, which, as to Vaughn, was a junior lien. His rights, then, were those of a junior lien holder.

The language of the allegations of Vaughn's petition, and of the terms of the decree alleging Shaw to be the holder of judgment and mortgage liens, fully describes his rights as against Vaughn. He was the holder of a lien under the mortgage executed by Lewis. The decree foreclosed his equity of redemption under that mortgage.

We have noticed all questions brought to our attention by counsel of plaintiff, and find no reason for disturbing the decree of the District Court.

AFFIRMED.

48 472  
119 540

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HAWK V. MARION COUNTY.

1. **Reward: POWER OF COUNTIES TO OFFER.** It is not within the power of a county to offer a reward for the arrest of persons charged with the commission of a crime, but the board of supervisors may offer a reward for the recovery of money which has been stolen from the county.
2. ———: ———: **PRO RATA PAYMENT.** Where a portion of the stolen money has been recovered, the party through whose agency the recovery has been effected is entitled to a *pro rata* share of the reward.
3. ———: ———: **RATIFICATION.** The fact that the board were not in session when they determined to offer the reward would not defeat the right of the party entitled thereto, if by their subsequent acts they ratified the offer.

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*Appeal from Marion District Court.*

THURSDAY, JUNE 6.

THE treasury of the defendant was robbed, and, as plaintiff claims, a reward was offered by the defendant for the arrest and conviction of the thieves, and an additional amount for the recovery of the money stolen. A demurrer to the petition having been sustained, the plaintiff appeals.

*Geo. W. Seevers and Bryan & Russell, for appellant.*

*Anderson & Gamble, for appellee.*

SEEVERS J.—I. The plaintiff claims to have procured the arrest and conviction of one of the thieves, and to have recovered or given such information as led to the recovery of a portion of the stolen money, and claims a *pro rata* share of the reward. This is resisted by the defendant on the ground the board of supervisors had no power or authority to offer the reward. There is no statute which expressly or by necessary implication imposes upon counties any duty in respect to the arrest of persons charged with crime. The purposes for which money belonging to a county may be expended are defined, in a great measure at least, by statute, and the expenditure must be for some legitimate purpose, connected with the county government, unless there is a statute authorizing it for a different purpose. The only manner counties can procure means to pay such rewards is by taxation, and the people of one county, as distinguished from the people of the State, have no such special interest in the arrest and conviction of criminals as will authorize the levy of taxes to pay such an expense, in the absence of a statute authorizing or imposing it.

It is the duty, primarily, of the State to cause the arrest and conviction of criminals, in the performance of which the State makes use of such officers and agencies as it sees proper,

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and, if the General Assembly saw proper, there is no doubt a duty in respect thereto could be legitimately imposed on counties. But instead of doing so, the statute expressly authorizes the Governor, in certain specified cases, to offer a reward for the apprehension of persons charged with the crimes of murder or arson. Code, § 58.

The statutes in Maine as to the power of towns, in this respect, are much like ours as to counties, and there also the Governor is authorized to offer rewards in certain cases. It was held in *Gale v. South Berwick*, 51 Maine, 194, that towns in that State had no power to offer rewards for the arrest of criminals. Such seems, also, to be the rule in Illinois. *County of Crawford v. Spermy*, 21 Illinois, 288. But a contrary rule was adopted in *The Borough of York v. Forscht*, 23 Penn. St., 391, on the ground that the burgesses of the borough were a part of the public police. *Jarwin v. Exeter*, 48 N. H., 83, is not applicable, because the power in that State is conferred by statute, and such is true as to *Crabshaw v. Rosberry*, 7 Gray, 374.

But, as to the power to offer a reward for the recovery of the money stolen, we think a different rule must prevail, and that to this extent the demurrer should have been overruled.

Counties are bodies corporate for civil and political purposes, and "may acquire and hold property, and make all contracts necessary or expedient for the management, control, and improvement of the same." Code, § 279.

Within the limits conferred by statute, the boards of supervisors have the same authority and power as to counties as that possessed by the General Assembly for the State at large, the essential difference being that the constitution of the State is prohibitory, and defines what the General Assembly may not do, while, as to counties, the authority of the board of supervisors must be found in the statute in express words, or by fair implication.

Such boards have full control of county property, and the care and management thereof. Code, § 303, sub-div. 11.

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They levy taxes for the purpose of defraying the expenses of the county government, and within the maximum fixed by law they are the exclusive judges of the necessities of the counties in this respect. Code, § 796.

Such being their duties, by necessary implication they are authorized, we think, to offer a reward for the recovery of money belonging to their several counties which has been stolen. If they cannot do so, then no such power exists. If the stolen money should not be recovered, a similar amount must be raised by taxation. Now, if the money can be obtained by offering a reward, the board has not only the power, but, we think, would be remiss in their duty should they fail to do so, if such, in their judgment, was the only or better way to recover the money.

If no such power exists, then, if advised the stolen money was probably on deposit in some distant place, they would not have the power to pay the expenses of any one to go to such place, identify the money, and return it to the county treasury.

Of necessity, it seems to us, this power must exist; otherwise, when a county treasury is robbed, the county authorities must fold their hands and remain passive until the thief repents and voluntarily returns the money, or rely on the exertions of the individual citizen to work and labor for the recovery of the money, without hope of pay or pecuniary reward. If the latter discovered the money under such circumstances, the temptation to divide with the thief, instead of the county, would be great.

We have been referred by counsel to *Webster County v. Taylor*, 19 Iowa, 119; *Soper v. Henry County*, 26 Id., 264; *Reichard v. Warren County*, 31 Id., 381, and *Long v. Boone County*, 36 Id., 60. But none of those cases have any application to the case at bar.

II. It is objected that the payment of the reward was conditional on the arrest and conviction of the thieves, and the recovery of the *whole* amount of money stolen. Such amount



## Hawk v. Marion County.

was *about* twelve thousand dollars, and the reward offered was "five thousand dollars for the arrest and final conviction of the thieves," and "five thousand dollars additional reward will be paid for the recovery of the money." It will be seen the reward offered for the recovery of the money is in no respect conditional on the arrest of the thief. They are wholly separate and distinct, and in this respect entirely different from the terms and conditions upon which the reward was payable in *Jones v. Phoenix Bank*, 38 N. Y., 228, cited by the appellee.

It is also insisted, as the plaintiff only claims to have recovered or given information which led to the recovery of a portion of the money, he is not entitled to recover a *pro rata* share of the reward. In *Symmes v. Frazer*, 6 Mass., 344, this question is expressly ruled against the appellee. In the present case, the amount stolen was uncertain; that is, the exact amount, we suppose, was not known. But, conceding it to have been exactly twelve thousand dollars, the position of the appellee amounts to this: If eleven thousand nine hundred and ninety-nine dollars had been recovered, no portion of the reward offered was payable, as was held in the Massachusetts case cited. We do not think this is a fair construction of the proposition. It was not so understood by the board of supervisors, because they paid the plaintiff a *pro rata* share of the reward for the recovery of another portion of the money than that now sued for.

III. It is insisted the board of supervisors were not in session when the reward was offered, or rather when they determined to offer it. But we regard it as too clear for serious controversy that they, afterward, and while in session, ratified and confirmed what had been done. This they had the power to do; for it was competent for them to ratify and make obligatory from the beginning any act irregularly done, which they, as an original proposition, had the authority to do.

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Hawk v. Marion County.

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In consequence of the reward offered, as it sufficiently appears from the petition, the plaintiff accepted the offer and undertook the recovery of the money, and after this, and perhaps after the plaintiff had done all he claims toward the recovery of the money, the acts of ratification took place. But this can make no difference, for both parties were acting in entire good faith, and the plaintiff had given information, as he claims, which led to the recovery of the money, relying, as he had the right to do, on the good faith of the defendant to pay the reward if he showed himself entitled thereto. The case of *Fetch et al. v. Snedaker*, 38 N. Y., 248, is not in point, because in that case the reward was offered to any person who should give information which would lead to the "apprehension and conviction" of the criminal, and the plaintiffs had no knowledge of the reward at the time they gave information which led to the arrest; and, as to the conviction, it was held that one who gave no information until after the arrest was not entitled to the reward.

Having determined the board had the requisite power, the amount of the reward, in the absence of fraud, was wholly within their discretion. Without enlarging on the question, we are of opinion the matters stated in the petition entitle the plaintiff to recover. Whether he gave such information as to entitle him to the reward is a question for the jury, under the instructions of the court.

**REVERSED.**

## WHITEHEAD V. CONKLIN ET AL.

48	478
90	103
48	478
105	394

1. **Dower; HOMESTEAD.** Upon the death of her husband the widow is entitled, at her election, to retain the homestead in lieu of so much of her distributive share, or to have her distributive share so assigned as to include the homestead; but she is not entitled to the homestead and dower in the remainder of the estate.

*Appeal from Lyon Circuit Court.*

THURSDAY, JUNE 6.

THE petition of plaintiff alleges that her husband, D. C. Whitehead, died seized of certain described real estate; that out of said premises plaintiff selected and caused to be surveyed and platted her homestead. Plaintiff claims a homestead interest for herself and family in the real estate so selected, and her dower interest in the remainder of the estate of her late husband. The petition asks that an order be made for the admeasurement of plaintiff's dower in said lands, except that portion claimed as her homestead. Certain of the defendants, who are creditors of the estate of D. C. Whitehead, deceased, answered, denying that the widow is entitled to a dower and homestead interest in the estate. The court ordered that the distributive share of the widow be so set off as to include the homestead. The plaintiff appeals.

*Joy & Wright*, for appellant.

*Thompson Bros.*, for appellees.

DAY J.—The position of appellant we understand to be that the widow is entitled to possess and occupy for life the property selected by her as a homestead, and that, in addition thereto, she is entitled to have one-third part of the remainder of the estate of which her husband died seized set off to her as her distributive share in

1. **DOWER:**  
homestead.

fee. In other words, that if the husband dies seized of one hundred and sixty acres of land, the widow may use and occupy one forty of it as a homestead, and have another forty, or one-third part in value of the remainder, assigned to her as her distributive share in fee.

Sections 2440 and 2441 of the Code are as follows: "One-third in value of all the legal and equitable estates in real property, possessed by the husband at any time during the marriage, which have not been sold on execution or any other judicial sale, and to which the wife has made no relinquishment of her right, shall be set apart as her property, in fee simple, if she survive him. The distributive share of the widow shall be so set off as to include the ordinary dwelling-house given by law to the homestead, or so much thereof as will be equal to the share allotted to her by the last section, unless she prefers a different arrangement. But no different arrangement shall be permitted where it would have the effect of prejudicing the rights of creditors."

Sections 2007 and 2008 are as follows: "Upon the death of either husband or wife the survivor may continue to possess and occupy the whole homestead, until it is otherwise disposed of according to law. The setting off of the distributive share of the husband or wife in the real estate of the deceased shall be such a disposal of the homestead as is contemplated in the preceding section. But the survivor may elect to retain the homestead for life in lieu of such share in the real estate of the deceased; but if there be no such survivor, the homestead descends to the issue of either husband or wife, according to the rules of descent, unless otherwise directed by will, and is to be held by such issue exempt from any antecedent debts of their parents, or their own."

These provisions, we think, are inconsistent with appellant's position. Suppose the husband dies seized of one hundred and sixty acres of land, and indebted to its full value. The widow is entitled to her distributive share, without reference to the debts of the husband. *Mock v. Watson*, 41 Iowa,

241. If appellant's position be correct, the widow would be entitled to occupy and possess forty acres thereof, as her homestead, which would descend to her issue exempt from any antecedent debts of herself or her husband. Code, §§ 2007, 2008. In addition thereto she could have set off to her, as her distributive share in fee, one-third part in value of the remaining one hundred and twenty acres, which also would descend to her issue exempt from her husband's debts. Such a construction would, as we think, be utterly inconsistent with section 2441 of the Code, which provides that the distributive share must be so set off as to include the ordinary dwelling-house given by law to the homestead, when a different arrangement would have the effect of prejudicing creditors.

Section 2008 of the Code provides that the setting off of the distributive share of the husband or wife in the real estate of the deceased shall be a disposal of the homestead, but the survivor may elect to retain the homestead for life in lieu of such share in the real estate of the deceased. This clearly indicates that the homestead cannot be held in addition to the distributive share. See *Butterfield v. Wicks*, 44 Iowa, 310; *Meyer v. Meyer*, 23 Id., 359. The plaintiff was entitled to her election to retain the homestead for life, in lieu of so much of her distributive share, or to have her distributive share so assigned as to include the homestead. Code, §§ 2008, 2441. The court ordered her distributive share to be assigned so as to include the homestead. It does not appear that plaintiff offered to make any election, for she prosecuted this action upon the theory that she was entitled to her homestead, and dower in the remainder of the estate. While, therefore, plaintiff is entitled to have the cause reversed, in order that she may, if she so desire, elect to take her homestead for life, in lieu of so much of her distributive share, she should pay the costs of this appeal.

At the cost of appellant, the cause is

**REVERSED.**

## BABLEY V. VYSE &amp; GATCHIE.

1: **Landlord and Tenant: DAMAGE.** A. leased certain premises to B., who put B. in possession; by the terms of the lease A. was to have all the corn-stalks grown upon the premises; B. sold his crop of corn to defendant, who turned his cattle into the inclosure, and they destroyed the corn-stalks, and injured the fruit trees and shrubbery: *Held*, that defendant was liable for taking and using the corn-stalks, and for the injury to the trees and shrubbery.

*Appeal from Fremont Circuit Court.*

THURSDAY, JUNE 6.

THE petition contains three counts:

"1. Charging that the defendants unlawfully and with force entered the premises of plaintiff, with a large number of cattle, and trod down, ate up and destroyed the grass, fruit trees, and shrubbery there growing, and injured and destroyed the buildings and improvements thereon.

"2. That defendants unlawfully entered said premises, and took and carried away, and converted to their own use, six hundred and forty bushels of plaintiff's corn.

"3. That defendants took and carried away from said premises, and converted to their own use, corn-stalks and fodder belonging to the plaintiff."

The answer was a general denial. There was a trial by jury, and a verdict and judgment for plaintiff. Defendants appeal.

*Stow & Hammond*, for appellant.

*Reed & Ellis*, for appellee.

ROTHROCK, CH. J.—There was evidence tending to show that plaintiff leased the premises for the year 1874 to one Smith, and that Smith put one Brownell in possession; that plaintiff was to have all the corn-stalks

1. LANDLORD  
and tenant:  
damages.

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grown on the land; that Brownell sold out his crop of corn to defendants and gave possession to them in October, 1874; that defendants turned into the inclosure some twenty or twenty-five cattle, and pastured the stalks, and said cattle destroyed fruit trees, shrubbery, etc.

The court instructed the jury as follows:

"3. If you find from the evidence that by the terms of the contract between plaintiff and his tenant, Smith, plaintiff was to have all the corn-stalks grown on the premises, raised and cultivated by said tenant, and should also find that defendants got said stalks, either by pasturing the same or cutting and hauling the same from said premises, then you should find for the plaintiff, on this part of his claim, and return a verdict for him for the value of said stalks so taken by defendants. Should you not find the foregoing facts, you should allow plaintiff nothing on this part of his claim.

"4. If you find from the evidence that the defendants turned their cattle into plaintiff's field, as alleged by plaintiff, in the first count of his petition, and that said cattle, while so in said field, injured the trees, shrubbery or buildings on said premises, then you should find for the plaintiff, on this part of his claim, and should allow the amount of the damage which said cattle did to said premises."

To the giving of these instructions the defendants excepted, and asked the court to instruct the jury as follows:

"1. If the defendants entered upon the possession of the premises with and by the consent of the party actually in possession, it is not trespass, and the defendants are not liable as trespassers.

"4. Unless you find that there has been a promise on the part of the defendants to keep the fences and premises in question in repair, they cannot be held liable to the plaintiff in this action for a trespass upon the premises in question during the term of the lease."

The court refused the instructions asked.

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Doughty v. Paige.

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It is urged that plaintiff cannot maintain the action because it is in the nature of trespass, and he was not in possession of the land, and it is not shown that there was any wrongful entry. But the evidence shows that plaintiff leased to Smith, and Brownell raised the crop and sold it to the defendants, and it does not appear that defendants purchased the corn-stalks of Brownell. Under this state of facts defendants are liable to plaintiff for taking and using the stalks, and for injury to the trees, fences, shrubbery, etc. They took whatever rights Smith or Brownell had, and could take no more, and are liable to plaintiff as wrong-doers for any injury to his rights. They had the right to remove the crop, but no right to injure the premises.

AFFIRMED.

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## DOUGHTY V. PAIGE.

1. **Attorney: CONTRACT: CUSTOM.** The custom of the attorneys of a certain county to hold themselves responsible for sheriffs' fees, in cases wherein they were employed, did not subject an attorney to liability therefor, in the absence of an express agreement, or of proof that the attorneys were accustomed to pay for such services regardless of the responsibility of their clients.
2. ———: **PRINCIPAL AND AGENT.** The fact that the attorney contracted for such services did not render him liable, since he made the employment in the capacity of agent of his client.

*Appeal from Pottawattamie District Court.*

THURSDAY, JUNE 6.

THE plaintiff was formerly sheriff of Pottawattamie county, and, as such officer, served notices and performed other services in cases pending in the District and Circuit Courts for persons for whom the defendant was acting as attorney. The petition avers that the plaintiff's fees for such services were charged to the defendant; that he consented thereto, and prom-



Doughty v. Paige.

ised to pay the same; that it was customary to charge such fees to attorneys, of which custom the defendant was informed. There was a trial without a jury, and judgment for defendant. Plaintiff appeals.

*Sapp & Lyman*, for appellant.

*G. A. Holmes*, for appellee.

ADAMS, J.—I. The plaintiff was examined as a witness in his own behalf, and his counsel asked him, among other questions, the following: "State whether or not it was generally customary among the attorneys of the Pottawattamie county bar, at that time, to become responsible to you for fees in cases in which they were attorneys?" To this question the defendant objected as immaterial, and the objection was sustained. In our opinion the question was immaterial. We think that the defendant would not have been bound by such custom if it had been proven. If the attorneys at that bar were accustomed to become responsible for fees, within the meaning of the question as we understand it, it was because they expressly so contracted. But a custom on the part of certain individuals to make certain express contracts would not establish an implied contract. Acts may be interpreted in the light of custom for the purpose of raising an implied contract, and a contract, whether express or implied, may be interpreted in the light of custom, for the purpose of determining its nature or extent, where they would otherwise be doubtful; but this, we believe, is about the extent of the office of custom.

But plaintiff claims that, aside from the custom on the part of the Pottawattamie county attorneys to agree to become responsible for sheriffs' fees, there was a custom of paying sheriffs independent of an express agreement, and that the evidence so shows. It is urged, therefore, that the defendant's acts in employing him, interpreted in the light of such custom, raised an implied contract to pay him. Before we

## Doughty v. Paige.

could hold that the defendant's acts had that effect, it should be made to appear to us, at least, that the attorneys were accustomed to pay, not only in the absence of an express agreement, but regardless of the responsibility of their clients, and whether they had money in their hands or not, belonging to their clients, and that such practice was uniform and of long standing. The evidence introduced falls short of this.

II. The plaintiff further claims that there was an express agreement by the defendant to become responsible. On this point the evidence is conflicting, and if we should concede that the preponderance is in favor of plaintiff, as his counsel claim, it would not justify us in disturbing the judgment.

III. In further support of plaintiff's claim, our attention is called to section 3837 of the Code, which is in these words:

2. ———: prin-  
cipal and  
agent. “When no other provision is made therefor, the party requiring any service shall pay the fees therefor, upon the same being rendered, and a bill of particulars being presented, if required.” It is claimed that where a sheriff renders service for a litigant upon the requirement of his attorney the attorney is the party requiring the service. It appears to us, however, that the attorney is merely the agent of the party requiring the service, and, his agency being known, he cannot, according to well established rules of law, be held liable in the absence of an express contract to that effect. In *Judson v. Gray*, 11 N. Y., 411, SELDEN, J., said: “It is a well settled rule of the common law that, where one person contracts as the agent of another, and the fact of his agency is known to the person with whom he contracts, the principal alone is liable, and not the agent.” This rule is directly applicable to the case of attorney and client, and has been so applied whenever the question has arisen, except in the State of New York. *Wires v. Briggs*, 5 Vt., 101; *Maddox v. Cranch*, 4 Har. & McHen., 343; *Morse v. Porter*, 13 Serg. & Rawle, 100; and *Preston v. Preston*, 1 Doug., 292.

**AFFIRMED.**

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 Spurrier v. Wirtner.
 

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## SPURRIER V. WIRTNER.

1. **Highway : APPEAL FROM ASSESSMENT OF DAMAGES.** Notice of appeal from an assessment of damages for the establishment of a highway must be served within twenty days, not only upon the county auditor, but also upon the applicant for damages, and if such notice is not served upon the latter within the time the appeal cannot be regarded as perfected.
2. ——— : ——— : **APPEARANCE.** The voluntary appearance in the Circuit Court of the applicant, who has not been served with notice as required by statute, for the purpose of moving to dismiss the appeal, does not constitute a waiver of the requirement of the statute.
3. ——— : ——— : ——— : *Robertson v. The Eldora Railroad and Coal Company*, 27 Iowa, 245, construed and explained.

*Appeal from Johnson Circuit Court.*

THURSDAY, JUNE 6.

THE defendant, Wirtner, filed in the office of the county auditor a petition asking for a change in a highway. The plaintiff, Spurrier, filed a remonstrance, with a claim for damages. Upon a hearing before the board of supervisors, the prayer of the petition was granted, upon the payment of the damages claimed to have been sustained by Spurrier, and assessed at one hundred and seventy-five dollars and costs. Afterwards, and within the twenty days allowed for an appeal from the assessment of damages, Wirtner served a notice of appeal upon the county auditor, and filed a bond, but did not, within the twenty days, serve a notice of appeal upon the claimant, Spurrier, but served a notice upon him after the expiration of the twenty days. The claimant, Spurrier, appeared in the Circuit Court and moved to dismiss the appeal, upon the ground that timely notice of appeal was not served upon him. The court sustained the motion. Defendant appeals.

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 Spurrier & Wirtner.
 

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*W. F. Conklin and Fairall, Bonordon & Ranck, for appellant.*

*Robinson & Patterson, for appellee.*

ADAMS, J.—The appellant claims—*First*, that the appeal was perfected without notice upon the claimant; and, *second*, if not, that the defect was cured by the claimant's appearing in the appellate court and filing a motion to dismiss.

The statute points out specifically how an appeal is to be taken in such a case. Code, § 960. Notice of appeal must be served within twenty days upon the county auditor *and applicant for damages*. The appeal cannot be regarded as perfected until the statute is complied with.

1. HIGHWAY:  
appeal from  
assessment of  
damages.

The point, however, upon which appellant seems especially to rely is the appellee's voluntary appearance, and we have

2. —: —: presented for our decision the question as to appearance. whether the voluntary appearance of the appellee in the appellate court, for the mere purpose of moving to dismiss, upon the ground that the notice of appeal was not served within the time required by statute, is to be regarded as a waiver of the failure to appeal within the time required. It is evident that the rule in regard to an original notice, whose only office is to bring a defendant into court to answer to a petition duly filed, has no proper application to this case. If the service is not sufficient to require the defendant to answer to the next term, other service can be made. If the defendant voluntarily appears, he has notice, the only question which concerns him being as to the term at which he should be required to answer, and, as to that, the court may make the proper order in view of the circumstances. If an appeal is not taken within the time required by statute, the adjudication becomes absolute. The successful party has a right to so consider it, and govern himself accordingly. Any attempt to disturb that adjudication by appeal, he has a right to

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The Delaware County Bank v. Duncombe.

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resist at the threshold. A want of notice is not waived by appearance where notice is jurisdictional, except where a subsequent notice would have the effect to give jurisdiction.

The appellant claims that a contrary doctrine was held in *Robertson v. The Eldora Railroad & Coal Company*, 27 Iowa, 245.

3. —: —: In that case there was an appeal from a railroad right of way assessment. Notice of appeal was served upon one of the directors of the defendant company. Mr. Justice BECK, who wrote the opinion, thought the service good. The majority, without expressing any opinion upon that point, thought the notice was waived by a voluntary appearance of the company. It does not appear to have been strictly necessary to rule upon the effect of the appearance, and the view of the majority of the court, as indicated in the opinion, can hardly be regarded as having the force of authority.

In our opinion the motion to dismiss was properly sustained.

AFFIRMED.

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THE DELAWARE COUNTY BANK V. DUNCOMBE.

1. **Pleading: DEMURRER.** It is not competent to assail the paragraphs of a pleading by demurrer, the demurrer being proper only when it attacks the legal sufficiency of the whole pleading or a count thereof.
2. **Practice: OPENING AND CLOSING.** Where it is apparent that upon the principal and material issues the defendant has the burden of proof, the action of the court in giving him the opening and close of the case cannot be assigned as error.
3. **Fraudulent Representations: EVIDENCE: CONTRACT.** The defendant, the general manager of a railway company, made a contract with I. for the grading of a part of the road, and I. sub-let some of the work to D., who, having performed a portion of what he had agreed to do, by a fraudulent collusion with the engineer, procured the acceptance of a draft by the defendant for work done under the sub-contract, notwithstanding such work had already been paid for by the contractor: *Held*, in an action upon the draft, that the defendant might be permitted to testify to the particulars of the contract between the contractor and the railway company.

48	488
83	701
48	488
118	38
48	488
122	236
48	488
129	756

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4. ———: ———. Evidence to establish the relation in which defendant stood to the railway company, was not incompetent.
5. ———: ———. Proof of the conversation between the engineer, who procured the acceptance of the draft, and defendant at the time the draft was accepted, was admissible.
6. ———: ———: A civil engineer was properly permitted to testify to admeasurements of the work performed under the sub-contract, notwithstanding such admeasurements were not made until eight months after the draft was drawn.
7. ———: DRAFT: DISHONOR OF. The draft having been sent to a local bank for collection by the plaintiff, which held it as collateral for advances to be made, it was presented to defendant, who said it was a swindle, and who refused to pay it. After that plaintiff made all the advances upon it, upon which its claim of ownership was based: *Held*, that the local bank was the agent of the transmitting bank, and that the latter was, therefore, charged with notice of dishonor, and any defense which would be valid against it in the hands of the sub-contractor was also valid against the plaintiff.
8. ———: PRINCIPAL AND AGENT. It was proper to instruct the jury that, to make available the defense of false representations, the defendant must show, not only that the acceptance was obtained by false representations, but also that such representations were known to the sub-contractor.

*Appeal from Webster Circuit Court.*

FRIDAY, JUNE 7.

THE plaintiff claims of the defendant the amount of a draft which the defendant accepted. The draft is dated November 22, 1873, and, with the indorsements thereon, is as follows:

"John F. Duncombe, General Manager of I. & M. R.:

"Please pay to the order of S. Denton & Co. one thousand five hundred and twenty-seven dollars and forty-one cents, which is in full for grading contract on I. & M. R. up to date.

"INGERSOLL & Co., Contractors,

"per L. C. PHELPS, Engineer."

"Accepted, payable December 20, 1873.

"JOHN F. DUNCOMBE."

"Pay W. H. Seeds, Cashier, or order.

"S. DENTON & Co."

The defendant filed an answer containing nine paragraphs, in substance as follows :

"1. That in June, 1873, defendant made a verbal contract with J. A. Ingersoll, through her agent, D. A. Ingersoll, to grade the Iowa & Minnesota Railway from the east line of Sac county to Sac City, at three thousand dollars per mile, payable as the work progressed on estimates made, out of taxes voted to aid said road ; said Ingersoll to take the entire risk of securing his pay from the tax voted, and to wait for the balance above the tax until it could be earned, and to complete the work during the year 1873.

"2. That S. Denton & Co. agreed to complete four miles of said road according to the specifications in the contract between Ingersoll and said railroad company, and were to receive eleven cents per yard for their work, ten per cent of which was to be retained out of their pay to secure the performance of their contract.

"3. That the said Denton & Co. proceeded with their work until it was nearly completed, the entire contract amounting to about six thousand dollars, and it requiring about the sum of two thousand dollars to complete the same, and that they were fully paid at the time they stopped work, in November, 1873, for all the work then done under their contract with Ingersoll.

"4. That S. Denton & Co. did the cheaper portion of the work, and left the finishing, and one long, deep slough, which would be very expensive to complete, and one station at the crossing of Cedar creek, uncompleted ; that while said work was in this condition S. Denton & Co., in order to defraud this defendant, combined with said engineer, and induced him to report to this defendant that said work was completed, and to make a final estimate on said work, which S. Denton & Co. and said engineer knew to be untrue, and to contain over seven

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thousand yards of earth more than was done by said S. Denton & Co.; that said S. Denton & Co. applied to the contractor, Ingersoll, to make a settlement with S. Denton & Co., which Ingersoll, on account of the fraudulent estimate, and on account of the work being uncompleted, and on account of the difficult and expensive work being undone, refused to do till the work was completed.

"5. That Ingersoll, in addition to the payments made in full on said work, held a note for one hundred and fifty dollars, which S. Denton & Co. agreed should be applied on the payment for grading under their contract.

"6. That said work has never been completed by S. Denton & Co., or by Ingersoll.

"7. That when said S. Denton & Co. failed to procure Ingersoll to collude with them in defrauding said railroad company, he procured the instrument in suit to be executed by said engineer in the name of said Ingersoll, without any authority or consideration whatsoever, all of which was known to S. Denton & Co.; that said engineer, at the instance and request of said Denton & Co., for the purpose of defrauding said railroad company and defendant, represented to defendant that said work of S. Denton & Co. was completed according to their contract, and had been settled; that the instrument in suit represented the amount due them; that the money was in the county treasury of Sac county to pay the same, and that it was necessary to have the instrument accepted to draw the money from the county treasury; that the defendant, relying upon and induced by the fraudulent statement of the engineer, wrote upon the face of said paper, without reading it or giving it any examination, the acceptance set out in plaintiff's petition.

"8. That on or about the 20th day of December, 1873, the defendant first learned that he had been deceived; that the representations made by said engineer were wholly untrue; that the instrument was fraudulently procured, without consideration; that S. Denton & Co. had been fully paid for all



the work done by them, and that Ingersoll had refused to make any settlement.

"9. That the plaintiff is not the owner of the claim in suit, and never paid S. Denton & Co. any consideration therefor; that said claim was left by said S. Denton & Co. with the plaintiff for collection, the proceeds when collected to be credited to them in said bank; that plaintiff had full notice of the facts herein stated; that when said defendant refused to pay said claim, it was, over two years since, placed in the hands of an attorney, and since that time has been under the direction and control of S. Denton & Co., and this suit is now brought under their order and direction."

The defendant denies every allegation in the petition not admitted. The plaintiff demurred to each of the paragraphs of this answer, except the last, denominating them counts or divisions. To these various paragraphs the demurrer assigned sixty-nine objections. The court overruled the demurrer, to which the plaintiff excepted. The cause coming on for trial the court gave to the defendant the opening and closing of the case, to which the plaintiff excepted. There was a jury trial, and a verdict and judgment for defendant. The plaintiff appeals, and assigns fifty errors.

*Theodore Hawley*, for appellant.

*John F. Duncombe*, for appellee.

DAY, J.—I. The answer of defendant contains but one count, divided into nine paragraphs. The demurrer does not  
1. PLEADING: demurrer. assail the answer as a whole, but presents objections to the paragraphs, treating them as distinct counts, and is based upon the notion that each should contain a defense to plaintiff's cause of action. It is not competent thus to assail the paragraphs of an answer by demurrer. *Hayden v. Anderson*, 17 Iowa, 158. For this reason the demurrer was properly overruled.

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II. The action of the court in allowing the defendant the opening and close of the case is assigned as error. While

2. PRACTICE: the answer does not admit, in terms, the allegations of the petition, yet it is apparent that, upon the principal and material issues in the case, the burden of proof is upon the defendant. We cannot say that the action of the court in this regard is so improper or prejudicial to plaintiff as to require a new trial. It has been held that the action of the court in refusing to allow a defendant the opening and closing cannot be assigned as error, nor made the basis of an appeal. *Goodpaster v. Voris*, 8 Iowa, 339.

III. Many errors are assigned upon the rulings respecting the testimony. To dispose of them, even briefly, will occupy much space. The defendant was asked to state the particulars of the contract between the railroad company and J. A. Ingersoll. The plaintiff objected. The objection was overruled. In this there was no error. Denton & Co. were sub-contractors under Ingersoll. It became a very material question upon the trial of the case whether certain unfinished portions of the work, including the long, deep slough referred to, and the station at the crossing of Cedar creek, were embraced in the contract of S. Denton & Co. Upon this question there is a direct conflict of evidence. It certainly has some bearing upon this question to show what was embraced in Ingersoll's contract, and what price she was to receive. From this the jury might determine whether it would be reasonable that Ingersoll would let the cheaper portion of the work at eleven cents per yard, leaving all the difficult parts for another contract, as claimed by S. Denton & Co. This view disposes of several of the objections made to the testimony of the defendant.

IV. Defendant was asked how much he advanced under the Ingersoll contract. The plaintiff's objection to this question was overruled. The defendant answered that he could not tell how much he advanced, but that it was a considerable

amount. We cannot see wherein the plaintiff could be prejudiced by this answer.

V. The defendant, having spoken as a witness of the contract of S. Denton & Co. with Ingersoll, said: "I knew nothing of the contract personally, as I was not present when it was made." Plaintiff moved to strike out all that defendant said respecting the Denton contract, for the reason that he states he did not learn the terms of that contract from S. Denton & Co., or from the plaintiff in this suit. The motion was overruled. The abstract does not show the existence of the fact assigned as an objection. Defendant does not say that he did not learn the terms of the contract from S. Denton & Co. He says: "S. Denton & Co. had the contract for four sections of the road, commencing about four miles this side of Sac City, including all the work from that point through the depot grounds, and, perhaps, a hundred or two hundred feet beyond. I do not remember the exact amount, as I learned from the parties." The parties are Ingersoll and S. Denton & Co.

VI. The defendant was asked what officer or agent of the 4. —: —. company used any authority to accept or approve of the final completion of the work. This was objected to as incompetent or immaterial, unless it can be shown that it was disclosed to S. Denton & Co. before they made their contract. The objection was overruled, and the witness answered, "No one but myself." This testimony may not be very important, and perhaps there would have been no substantial prejudice in rejecting it; still, in view of the fact that defendant claims he was induced by fraudulent representations to accept the draft, we think it is not improper to show the relation in which he stood to the company and to the contract. Evidence of such fact supplies a part of the history of the case, valuable, at least, if not necessary to a full comprehension of the case. We are satisfied that no substantial prejudice could have resulted from the admission of this testimony.

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VII. The defendant was permitted to testify to a conversation he had with Phelps, the engineer in charge of the work, at the time the draft in suit was accepted. The draft was presented by Phelps to the defendant for acceptance, and the conversation detailed related to the acceptance, and was in substance that it was for S. Denton & Co.'s final estimate; that the matter was settled, and was all right. The defendant charges a combination between S. Denton & Co. and Phelps, the engineer, to deceive and defraud him, and it cannot be denied that there is evidence tending to support the charge. Under the issue it was not error to admit proof of what Phelps did about procuring the settlement. This view disposes of the error assigned upon overruling the objection to the testimony of Richards, and the cross-examination of Phelps.

VIII. It is insisted that the court erred in allowing defendant to testify as to what would be the relative cost of completing the work, to that already done. It is alleged that the fraud consisted in doing the cheaper portion of the work, and representing that it was all done. The relative cost of that completed and that undone bore directly upon this issue, and was properly shown.

IX. The plaintiff moved to suppress twenty-three answers or parts of answers in the deposition of D. A. Ingersoll, which motion was overruled. Upon this action of the court fifteen distinct assignments of error are based. No argument is made upon these assignments, except that plaintiff insists that the court erred in overruling his motion to suppress portions of the depositions of D. A. Ingersoll, and asks a careful reading of this portion of the evidence, satisfied this court will have no difficulty in finding error sufficient to demand the reversal of the judgment. It is no part of the duty of this court to hunt after errors for the reversal of a case. Unless prejudicial error affirmatively appears, causes should be affirmed. Assignments of error presented in so general a way should be regarded as unargued, and hence as waived. This

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view also disposes of the assignments of error based upon the overruling of objections to the testimony of W. H. Seeds. We think, however, that it could readily be shown that in these respective rulings there is no substantial error. These views are also applicable to the testimony of the witnesses Colburn and Simmons.

X. One N. B. Everts, a civil engineer, was introduced by s. —:—. defendant and testified as to measurements which he made in July, 1874, of the work done by Denton & Co. The plaintiff objected that this testimony was incompetent and immaterial, because the measurements were made nearly eight months after the draft was drawn. This fact might affect the value of the evidence, but not its competency and materiality.

XI. W. H. Seeds, cashier of the Delaware County Bank, testified as follows: "The way said bank became possessed 7. —: draft: dishonor of. draft the firm of S. Denton & Co., composed of S. Denton and Alexander Bently, were engaged in the business of buying and shipping grain from Masonville to Chicago, and had been for some time. They did their banking business with said Delaware County Bank. The bank was unwilling to do their business, and advance to said firm money, without collateral security. Hence the draft was turned over to them by said firm, and accepted by said bank for advances to be made to said firm. At about the 31st day of December, 1873, the style of said firm changed to Bently & Co., a company composed of Alexander Bently and Samuel Denton, the same parties composing the firm of S. Denton & Co., to whom said bank continued to advance money upon said draft until the 27th day of May, 1874. Said bank had advanced upon said draft at the 27th day of May, 1874, the sum of eleven hundred and sixty-nine dollars and ninety-two cents, for which the bank had no other security, nor have at this time." There is no other testimony at all in conflict with this evidence. The evidence further shows the following facts:

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The bank became possessed of the draft on the 11th day of December, 1873. The books of the bank show a balance in favor of S. Denton & Co., on the 22d day of December, 1873, of one dollar and nine cents. On the 31st day of December, 1873, an account was opened with Bently & Co. On the 7th day of January, 1874, there was a balance in favor of Bently & Co. of eleven dollars and ninety cents. On the 8th day of January, 1874, the account was overdrawn, for the first time, to the extent of three hundred and seventy-eight dollars and eighty-five cents. On the 5th day of February, 1874, Bently & Co. were indebted to the bank one hundred and seventy-two dollars and eighty-eight cents. On that day they drew upon check five hundred dollars, and continued to draw out until March 29, 1874, when the account stood against them one thousand one hundred and sixty-nine dollars and ninety-two cents. During this time their dealings with the bank amounted to thirteen thousand four hundred and seventy-three dollars and seventy-seven cents. Neither S. Denton & Co. nor Bently & Co. have any credit upon the books of the bank for the draft in suit.

The articles of incorporation of plaintiff contain the following provision: "If any bill or note belonging to the bank shall not be paid before three o'clock p. m. on the last day of grace, such bill or note shall be forthwith protested, and, while such bill or note remain unpaid, no discount or accommodation shall be granted to any drawer, acceptor or indorser of the same." In the latter part of November, or the first part of December, 1873, the draft in question was sent to the First National Bank of Fort Dodge for collection, with orders not to protest, but to return if not paid. The defendant was notified by the First National Bank that they held the note for collection, and he refused to pay it.

On the 9th day of January, 1874, plaintiff directed the cashier of the First National Bank of Fort Dodge as follows: "Please present the accepted draft to Mr. Duncombe for payment once more, and if not paid within five days please give

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the same to Mr. Hawley, attorney at law, for collection, and have it collected as soon as possible." Mr. Hawley received the draft for collection about the 13th day of January, 1874, but suit was not commenced until the 20th day of December, 1875. The draft, as we have seen, was payable on the 20th day of December, 1873. No advancement was made by the plaintiff to Bently & Co., on the faith of this draft, before the 8th day of January, 1874. The draft was then dishonored paper. The First National Bank of Fort Dodge, as agent of plaintiff for the collection of the note, and while engaged in the business of their agency, were informed by Duncombe that he would not pay the draft, and that it was a swindle. The knowledge of the agent thus acquired was the knowledge of the plaintiffs, the principals; so that the plaintiffs made the first advancements upon this draft after it was dishonored, and after they were affected with notice that the acceptor refused to pay it. Not only so, but they made the advancement in violation of the provisions of their articles of incorporation, which provide no discount or accommodation shall be granted any indorser of a bill belonging to the bank, not paid before 3 o'clock p. m. of the last day of grace.

If plaintiffs had bought the draft on the 8th day of January, 1874, they would hold it as dishonored paper, subject to all the equities growing out of the transaction existing between the acceptor and the payee. It cannot be claimed that the undisputed facts of this case place the plaintiffs in any better position. Upon this branch of the case the court instructed the jury as follows: "The draft or acceptance having been assigned or indorsed to the plaintiff as collateral security for money to be advanced to Denton & Co., and the money having been repaid, except the advances which were made after the maturity of the acceptance, I direct you that any defense which has been sustained against it in the hands of Denton & Co. will be equally good against it in the hands of plaintiff." As applied to the established facts of this case, this instruction, we think, is correct. The foregoing view also disposes

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of the alleged error in refusing to give the first instruction asked by the plaintiff.

XII. The plaintiff insists that the court erred in refusing to give the third instruction asked, as follows:  
s. ———: principal and agent. “If the jury find from the evidence that S. Denton & Co. did work on the railroad in question for Ingersoll & Phelps, or Ingersoll, and that in settlement for said work Ingersoll, or Ingersoll & Phelps, agreed to give them a draft accepted by defendant, and, in carrying out said agreement, Phelps drew the draft in suit, and presented it to the defendant, who accepted it, after which Phelps delivered it, so accepted, to S. Denton & Co., then Phelps, in so drawing said draft, and presenting it to defendant for acceptance, was not an agent for Denton & Co. for that purpose.” The court gave the following instruction:

“5. In order to make available the defense of false representations, it will be necessary for the defendant to show, not only that the acceptance was obtained by false representations made by Phelps, but that Denton & Co., or one of them, knew it had been so obtained. In other words, the fact that Phelps obtained the acceptance of the draft, not being the agent of Denton & Co., will not of itself be evidence that Denton & Co. knew of the representations, if any were made; but you may consider the relations of the parties, Denton & Co. and Phelps, with all the evidence tending to show what actual knowledge Denton & Co. had of the manner of procuring the acceptance, and determine the question of their knowledge as shall appear from the preponderance of the evidence.”

This instruction is based upon the theory that Phelps was not the agent of Denton & Co., for, if he was their agent, his knowledge and acts would be theirs, and it would not be necessary to prove that they knew that the acceptance was obtained by false representations. In view of the instruction given, there was no error in refusing that asked. For the same reason there was no prejudicial error in refusing to give the fourth instruction asked.



XIII. The plaintiff assigns as error the refusal of the court to give the fifth instruction asked, which is as follows: "The plaintiff having sent the draft in suit to the First National Bank of Fort Dodge for collection, this did not constitute the First National Bank of Fort Dodge agents for plaintiff, so that knowledge of the infirmities in this draft, communicated to the First National Bank, would be knowledge of the same to the plaintiff."

This point has been anticipated to some extent. The First National Bank of Fort Dodge was the agent of plaintiff for the collection of the draft. Whatever knowledge the bank acquired respecting the draft was obtained from the defendant when they were actively engaged about the collection of the draft, and was naturally elicited by such efforts. The knowledge of the agent, thus obtained, is the knowledge of the principal. The principle of the sixth instruction asked is embraced in and covered by the eighth instruction given.

XIV. Plaintiff objects to so much of the fifth instruction given by the court, and set out above, as is contained in the following language: "With all the evidence tending to show what actual knowledge Denton & Co. had." It is claimed there is no evidence in the case justifying this language. It is true no witness directly testified that Denton & Co. had knowledge of the circumstances under which the draft was procured, and yet we feel satisfied that the evidence does tend to show that Denton & Co. had such knowledge.

XV. Appellant complains of the giving of the sixth instruction, as follows: "If Phelps, in order to procure the acceptance, stated to the defendant that Denton & Co.'s contract had been completed, and that the money was in the treasury of the county to pay the draft from the tax voted in aid of the construction, and the defendant believed the same, and did not know to the contrary, and, relying upon the statements so made, accepted the draft, and you find that the statements were untrue, and that Denton & Co. took the draft with knowledge that its acceptance had been obtained upon such

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The State v. O'Mally.

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statements, and that they were untrue, your verdict will be for the defendant." It is claimed that this instruction is so worded as to convey to the mind of the jury that the court intended to charge them, as a matter of fact, that the defendant, in accepting the draft, relied upon the statements made by Phelps. It is apparent, from a reading of the instruction, that this criticism is not well grounded. It is further claimed that there is no proof that the money was not in the county treasury to pay the draft. It is true there is no direct proof of this fact, but it may, we think, be inferred from the fact that S. Denton & Co., as Samuel Denton testifies, would not agree to accept a draft upon Duncombe unless he would accept it personally.

We discover in the whole record no error justifying a reversal of the case.

**AFFIRMED.**

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THE STATE V. O'MALLY.

48	501
96	296

1. **Criminal Law: PLEADING.** An indictment charging the defendant with "wilfully and maliciously verbally threatening to kill and murder" another is sufficient, notwithstanding it does not set out the words used.
2. ———: ———. The gist of the offense being the threat, the fact that it was directed against two persons would not constitute it two offenses.

*Appeal from Fayette District Court.*

FRIDAY, JUNE 7.

THE defendant was indicted for threatening verbally to kill Zenana Staats and F. S. Wood, with the intention of thereby causing them to leave their home against their will. Upon a trial he was convicted, and fined in the sum of ten dollars. He now appeals to this court.

*Ainsworth & Hobson and Rickel & Clements, for appellant.*

*J. F. McJunkin, Attorney General, for the State.*

BECK, J.—I. Counsel for the defendant insist that the indictment is bad for the reason that, as it does not set out the threatening words used by defendant, it alleges a legal conclusion. The language of the indictment is, that defendant did "wilfully and maliciously verbally threaten to kill and murder Zenana Staats and F. S. Wood." This is not the allegation of a legal conclusion, but of the act of defendant, and is sufficient without setting out the words used. The words of the defendant were not the gist of the offense, which is found in the intention of defendant to convey thereby a threat. The threat should be averred, and may be shown by the words used.

II. It is insisted the indictment charges two offenses, inasmuch as it is alleged that the threat was made against two persons. As we have said, the gist of the offense is the threat. It is shown to have been directed against two persons. Two threats are not alleged, but one threat against two persons. This constitutes but one offense.

III. It is urged that the evidence fails to show a threat against two persons. We think there was testimony to that effect, and that the jury were authorized so to find.

IV. The defendant asked the court to instruct the jury that the threat charged in the indictment could not be established by proof of acts other than words spoken or written, or printed communication. This instruction was properly refused, for the reason that it is erroneous, and therefore would have been, if given, prejudicial to defendant. The indictment charges the threat to have been made verbally, and could not have been supported by evidence of a written or printed communication.

An instruction given was to the effect that to authorize conviction the State must prove the threat as charged in the

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indictment. The jury were, thereby, sufficiently informed that menaces by gestures or the like, if shown, should not be considered by them.

V. The testimony sufficiently supports the verdict.

AFFIRMED.

48	603
79	128

VAN BRUNT & Co. v. MATHER ET AL.

1. **Pleading:** STATEMENT OF CAUSE OF ACTION. Under the Code the same cause of action may be stated in different counts and in different forms.
2. **Partnership:** AUTHORITY OF PARTNER: PROMISSORY NOTE. If a firm is engaged to any extent in making collections, even though that may not be the principal business of the partnership, one of the partners may bind the firm by a promissory note given for a balance of money collected by it.

*Appeal from Winneshiek District Court.*

FRIDAY, JUNE 7.

ACTION at law upon a promissory note executed by a firm, of which defendants were copartners. There was a judgment for plaintiff. Defendant Green appeals.

*Stoneman & Chapin*, for appellant.

*Brown & Wellington*, for appellees.

BECK, J.—I. The original petition declared upon a promissory note executed by E. Mather & Co., and averred that defendants, as copartners, constituted that firm. An amendment to the petition, called an additional petition, was subsequently filed, alleging that defendants were copartners, and as such received from plaintiffs certain agricultural implements for sale; that the property was sold by defendants and promissory notes taken

1. PLEADING:  
statement of  
cause of ac-  
tion.

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in payment, which were left by plaintiffs with the firm for collection, and were by the firm collected, and that thereafter plaintiffs and the firm had a settlement, and there was found due plaintiffs an amount for which the promissory note in suit was executed. Thereupon defendant Green asked that plaintiffs be required to elect on which cause of action set up in their petition or amended petition they would rely, and that the other be stricken out. The motion was overruled, and this action of the court constitutes the first ground of objection urged upon our attention by defendant.

If it be conceded that the petition, as amended, presents two causes of action, it is not for that reason bad. Under the Code the same cause of action may be stated in different counts and in different forms. The practice prescribed in the Revision has been changed in this respect by the Code. *Pearson v. The Milwaukee & St. Paul Railroad Company*, 45 Iowa, 497. The ruling of the court below was, therefore, correct.

II. It is urged that the transaction for which the note was given was not within the scope of the business of the firm.

2. PARTNER-  
SHIP: author-  
ity of partner:  
promissory  
note.

The testimony shows that defendant received of plaintiffs notes for collection, and the paper in suit was given for money collected thereon. The articles of copartnership between defendants show the business of the firm to be general storage, forwarding and commission, the erecting and operating of a grain elevator, and building and doing other work under contract. It is shown that the firm did, to some extent, a collection business; at least, they collected notes left with them for that purpose, which had been given for implements and machinery sold by them. It is not shown that plaintiffs, or any other persons doing business with defendants, had knowledge of the limitation of their business as above stated. As it is shown that the firm did do the business of collection, it must be regarded, so far as the rights of plaintiffs are involved, to be the business of the firm. *Stanchfield v. Palmer*, 4 G. Greene, 23; *Lindley on Partnership*, p. 192.

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Gray v. Lake.

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III. It is next urged that the firm had been dissolved before the note was executed. But the court was authorized to find from the testimony the contrary conclusion of fact.

IV. The conclusions we reach, above stated, dispose of the case. The court below was justified, upon the testimony, in finding that the note was given in a transaction within the business of the firm, as prosecuted, and that the copartnership had not been dissolved. All objections not noticed above are disposed of by these conclusions.

AFFIRMED.

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## GRAY V. LAKE ET AL.

1. **Deed : CONSIDERATION : FRAUD.** An agreement to do a thing is a sufficient consideration to support a deed, even though, as a matter of fact, the agreement is never performed. The fact that a purchaser from the grantee believed that such an agreement would not support the deed, and that it never would be performed, would not make his purchase fraudulent, or invalidate his title.

*Appeal from Clinton Circuit Court.*

FRIDAY, JUNE 7.

ACTION to set aside a conveyance made by the defendant Joseph Willis to his co-defendants Benjamin Lake and A. L. Ankeny, of certain land in the city of Clinton. The land formerly belonged to one Eunice N. Gray, now deceased. During her life-time she executed a deed to the plaintiff, and he claims to be the owner of the same under such deed. The defendants Lake and Ankeny claim to derive title through a deed executed by Eunice N. Gray to Willis, prior to the execution of the deed by her to the plaintiff. The question in this case is as to the validity of the deed to Willis. Other facts are stated in the opinion. Decree for defendants. Plaintiff appeals.

*D. Gray*, for appellant.

*Walter I. Hayes, Geo. B. Young, I. Monroe, and W. W. Stevens*, for appellees.

ADAMS, J.—The plaintiff assails the deed to Willis upon the ground that it was without consideration. The consideration expressed in the deed is one dollar; but in fact neither that nor anything else was paid. At the time it was executed Willis agreed to furnish his grantor certain fruit trees as the real consideration of the land; but he failed to perform his agreement. This, however, did not render the deed void as for want of consideration, the agreement itself being a sufficient consideration to support the deed. This identical question has been adjudicated between the parties. *Lake v. Gray*, 35 Iowa, 459. The plaintiff, however, claims that since the decision in that case he has discovered fraud. The facts upon which he relies are that Lake and Ankeny said, before they purchased of Willis, that they knew that Willis' title was worthless, and also that Willis was worthless, and unable to pay the consideration agreed to be paid, and Lake and Ankeny knew it.

A statement by Lake and Ankeny that they knew Willis' title to be worthless did not make it so, nor in any way affect the title when acquired by them. If they made such statement they believed just as the plaintiff appears at one time to have believed, or claimed to believe, that the performance by Willis of his agreement to furnish fruit trees was necessary as a consideration to support the deed. They were laboring under a mistake of law.

Nor is their title to be affected because Willis has not paid for the land and is irresponsible, and Lake and Ankeny knew it. Nor would the case be different if Willis sold to them without any intention of paying for the land. This action is not brought to subject the land to the payment of Willis' debt. It is brought upon the theory that Willis never owned

## Richards v. Wapello County.

the land, and, of course, never owed for it. But this question has been adjudicated between the parties, and the ground upon which the plaintiff seeks to stand now is utterly inconsistent with that adjudication. A valid title having passed to Willis, Lake and Ankeny could not perpetrate a fraud upon his grantor with respect to such title.

AFFIRMED.

## RICHARDS V. WAPELLO COUNTY.

1. **Taxation: IMPROVEMENTS UPON REALTY.** Improvements upon real property, though made at the expense of the personal estate of the owner, and diminishing the amount of personalty subject to taxation, are not to be regarded as taxable property until the real estate is again assessed in the manner provided by law.
2. ———: **RECOVERY OF UNAUTHORIZED PAYMENT.** Where a party has paid, under protest, taxes which should not have been assessed, and the board of supervisors has refused to refund the amount so paid, he may maintain an action at law for the recovery of his money.

*Appeal from Wapello District Court.*

FRIDAY, JUNE 7.

THE plaintiff avers that the defendant erroneously and illegally exacted from him the payment of certain taxes, and he brings this action to recover from the county the amount thus paid. The plaintiff is the owner of a certain lot in the city of Ottumwa, in Wapello county, upon which he erected a block of buildings, commencing in August, 1875, and completing it in March, 1876. The lot was duly assessed in January, 1875. In January, 1876, the block of buildings in process of construction upon the lot was assessed at five thousand six hundred dollars, and added to the amount of the plaintiff's personal assessment for that year. The assessment of this block, the plaintiff claims, was illegal. He paid the tax, under protest, and petitioned the board of supervisors for an order on the county treasurer to refund it, which they

48	507
90	239
190	248
48	507
1140	453



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Richards v. Wapello County.

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refused to grant. Judgment for plaintiff for the amount paid. Defendant appeals.

*D. H. Emery and John B. Ennis*, for appellant.

*William McNett*, for appellee.

ADAMS, J.—I. Personal property is to be listed and assessed each year, and real property each odd numbered year. Code, § 812. Between the 1st of January, 1875, and the 1st of January, 1876, the plaintiff had converted about five thousand six hundred dollars of his personal property into the block of buildings in question. The county claimed that the property so converted should not be permitted to escape taxation altogether, and that it was properly assessable in some form in January, 1876. Section 812 of the Code provides that all taxable property shall be taxed each year. The property in question was not taxable as real property in 1876, because, as real property, it was simply an improvement upon the lot, which was not assessable until 1877. The property in the improvement, then, not being taxable as real property for the year 1876, and all taxable property being taxable each year by express provision of the section cited, it is claimed by the county that the improvement, for the purposes of taxation, should be regarded and assessed as personal property.

It appears to us, however, that the provision that all taxable property shall be taxed each year is not susceptible of the construction which the county would put upon it. The money used in making the improvement disappears as personal property, and the result of the expenditure appears as real property. But when it so appears it has become indented with the lot, and is taxable only under the denomination under which the lot is known. The lot is taxed each year, although assessed only in the odd numbered years, and we think that that satisfies the requirements of the law. In one sense it is true the improvement made in the odd numbered year escapes taxation for one year, but in the same sense property escapes

## Richards v. Wapello County.

taxation where for any cause it is enhanced in value during the first year after the assessment upon which the taxes are levied. It is urged, however, by the county, that the plaintiff's personal property has become less by reason of making the improvement, if the improvement cannot be treated as personal property, and so his taxes are diminished, while his property in the aggregate remains the same. But this results from the fact that his personal property has really become less, and his real property, under the denomination under which alone it is assessable, remains the same. The lot in question was assessed as lot 14 in Mill donation to the city of Ottumwa. After the improvement was made the property was still lot 14 in the said Mill donation, and was assessable only as such. To hold that there should be traced out and assessed as personal property, in the even numbered years, all improvements upon real property made during the preceding year, would be adopting a construction of the statute quite different, we think, from that which has been given it in practice, and one of which, we think, it is not properly susceptible.

As to the provision that "all taxable property shall be taxed each year," we think it may be said that the enhanced value of real estate should not be regarded as taxable property until the real estate is assessed in the manner which the statute provides.

II. It is claimed by the county, however, that the plaintiff, even if he was entitled to have his taxes refunded, cannot recover in this action, because his only remedy was by appeal from the action of the board of supervisors in refusing to grant an order upon the county treasurer, as the plaintiff prayed. It is urged that at common law no recovery can be had for taxes illegally collected, unless the same were paid under compulsion; that the plaintiff is entitled to recover only by a provision of statute, section 870 of the Code; that the same section provides a tribunal, to-wit: the board of supervisors, to pass upon the plaintiff's right, and that that tribunal, provided by statute

2. \_\_\_\_\_:  
recovery of  
unauthorized  
payment.

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Richards v. Wapello County.

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to pass upon a question of statutory right, has exclusive jurisdiction of the question as an original one. In support of this position our attention is called to the case of *Macklot v. The City of Davenport*, 17 Iowa, 379. In that case it was held that where there is an unjust over-assessment, in distinction from an assessment of property which the law has made no provision for assessing, the party aggrieved should apply to the board of equalization for a correction; that that tribunal, being constituted for that purpose, has exclusive jurisdiction. But the correction of an over-assessment and the recovery of money paid as taxes upon property which should not have been assessed at all are different matters. The plaintiff has a money claim against the defendant county, differing in no essential particular from any other claim for which the county is liable. It has wrongfully taken the plaintiff's money. It ought to refund.

The common law doctrine, that he who voluntarily pays a tax shall not afterward be heard to say that it was illegal, is based upon the idea that he should have resisted payment. The doctrine pertained to the remedy, not to the essence of the claim. Our statute—Code, § 870—provides for the refunding of a tax erroneously, though voluntarily, paid. We see no reason why, if the board of supervisors refused to grant the order for refunding, the plaintiff may not assert his claim in the courts. Doubtless application should be made to the board before the county is put into costs. But, if they refuse, it becomes a proper subject for adjudication upon allegations and proofs, according to the methods of the courts. *Wapello County v. Sinnamon*, 1 G. Greene, 413; *Lauman v. Des Moines County*, 29 Iowa, 310.

**AFFIRMED.**

## MCINTIRE v. MCINTIRE.

48	511
78	89

1. **Practice:** PLEADING: SUFFICIENCY OF. An objection to the sufficiency of a pleading cannot be made for the first time in an instruction to the jury; it must be raised by motion, demurrer, pleading, or motion in arrest of judgment.

*Appeal from Muscatine District Court.*

FRIDAY, JUNE 7.

ACTION to recover possession of a threshing machine, on the ground that plaintiff was the owner thereof. The answer denied the several allegations in the petition, and by way of *counter-claim* alleged the defendant had been damaged in the sum of seven hundred dollars by reason of the suing "out of a writ of replevin against this defendant, and causing the same to be levied" on said machine. There was a jury trial, verdict and judgment for the defendant, and the plaintiff appeals.

*D. C. Cloud*, for appellant.

*J. Scott Richman* and *Thomas Hanna*, for appellee.

SEEVERS, J.—I. The fourth and fifth instructions recognize the principle, and authorize the jury to give the defendant damages for the wrongful taking and detention of the machine. It is urged these instructions, under the pleadings, are erroneous; that a counter-claim cannot be pleaded in an action of this character. Code, § 3226. Therefore the answer presented an immaterial issue, and should have been disregarded. The answer stated "that defendant, by way of counter-claim, \* \* claims of plaintiff \* \* seven hundred dollars, \* \* and that by reason of the wrongful and malicious suing out of said writ of replevin he has sustained damages to the amount aforesaid." To the answer there was a reply denying the allegations therein. No objec-

1. **PRACTICE:**  
pleading; suf-  
ficiency of.

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McIntire v. McIntire.

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tions were made to the answer, or to the evidence when introduced tending to show such damages, nor were any exceptions taken to the instructions at the time they were given. No motion in arrest of judgment was made, but there was a motion for a new trial, because there was error in giving the foregoing instructions.

Under these circumstances the objection came too late. If the machine was wrongfully taken and detained by the plaintiff, the defendant was entitled to damages, and it was the duty of the jury to assess the same, and judgment should have been rendered accordingly. Code, §§ 3238, 3239.

An objection to the sufficiency of a pleading cannot be raised for the first time by way of an instruction to the jury. *Nollen v. Wisner*, 11 Iowa, 191.

The objection should be made by motion, demurrer, reply, or in arrest of judgment. Code, § 2650.

II. It is next urged the verdict is against the evidence in this, that the jury assessed the value of the machine at one hundred dollars, and it is said the only testimony as to the value was that of the plaintiff, who stated as a witness it was worth nothing. The petition was under oath, and therein the plaintiff alleged the machine was worth three hundred and fifty dollars, and there was evidence as to the kind and condition thereof, and as to its rental value per year.

We are not prepared to say there was no evidence of value, or that the jury were bound to believe what the plaintiff stated as a witness, and totally disregard what he had stated as to the value of the machine in the petition under oath.

**AFFIRMED.**

## DAVIS V. HARPER.

1. **Statute of Limitations: WHEN ACTION IS BARRED IN ANOTHER STATE.**

Under the Revision, when a personal action has become fully barred by the laws of any other country or State in which the defendant has resided, such bar will constitute a defense to the action in this State, and this is true whether or not the cause of action arose in this State.

*Appeal from Adams Circuit Court.*

FRIDAY, JUNE 7.

It is averred in the petition that, in the year 1855, the defendant, a resident of Illinois, came to Adams county, in this State, the plaintiff's place of residence, and employed plaintiff to survey vacant lands and furnish numbers of lands, for the purpose of entry at the land office, for the agreed price of five dollars per quarter-section; that plaintiff furnished to defendant the numbers of thirteen quarter-sections, and surveyed the same, for which defendant was to pay the agreed price in cash at once; that defendant entered said land for himself and other parties, and, without paying plaintiff for his said services, purposely and wrongfully left the jurisdiction of Iowa courts to avoid suits, and has been a non-resident of Iowa ever since that time.

The answer pleads payment in full for the alleged services, and also the statute of limitations of the State of Illinois, and the statute of limitations of this State.

There was a trial by jury, and a verdict and judgment for the defendant. Plaintiff appeals.

*Davis & Wells and J. H. Maley, for appellant.*

*Twining & Russell, for appellee.*

ROTHROCK, CH. J.—I. It is conceded that, at the time the  
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 Davis v. Harper.
 

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alleged contract was made and services rendered, the defendant was a resident of the State of Illinois, and that he has ever since that time resided, and now resides, there. The principal question presented is whether the action is barred by the statute of limitations.

The court gave to the jury the following instruction: "7. If you find from the evidence that, at the time of performing the service and for five years thereafter, the defendant continued to reside in the State of Illinois, and that that was his place of residence during said time, and that he has never resided in Iowa, then you are instructed that this action would be barred by the statute of limitations, and you will find for the defendant."

An instruction was asked by plaintiff that, if the "defendant has been a non-resident of the State of Iowa from about the time the cause of action accrued until the commencement of this action," the statute of limitations did not run in defendant's favor during such non-residence. This instruction was refused.

It was shown upon the trial that by the statute of Illinois actions of this character are barred in five years after the cause of action accrues. This action accrued to the plaintiff in 1855. It was not local in its character. It is true it was a contract made and to be performed in this State. But it was a contract upon which a personal action could be maintained in any court where jurisdiction of the person of the defendant could be obtained. It was fully barred by the statute of Illinois, because not brought within five years, and being thus barred by the laws of Illinois it was also barred by the laws of this State. Revision, § 2746.

It is argued that the time of defendant's residence in Illinois should not be computed, because the cause of action arose in this State.

Section 2746 of the Revision is in these words: "But when a cause of action has been fully barred by the laws of any country, where the defendant has previously resided, such

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 Wilson v. Hardesty.
 

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bar shall be the same defense here as though it had arisen under the provisions of this chapter."

This section applies to actions generally, whether they arose within or without the State. The phrase "as though it had arisen," etc., has reference to the bar of the action, and not to actions arising in this State.

This construction, we think, is manifest. It is also strengthened by the fact that the Legislature, in 1870, amended said section so that it should not apply to causes of action arising within this State.

Without further discussion, we think the question involved in this case was fully determined in *Thompson v. Read*, 41 Iowa, 48.

The opinion in that case is not inconsistent with *Weaver v. Carpenter*, 42 Iowa, 343. In the last named case the action was local, being for the recovery of land, and could not be barred by the laws of another State, because no action could be maintained there.

II. It is insisted that there was no proper evidence as to the statute of limitations of the State of Illinois. We think that the volume of statutes introduced in evidence by defendant was sufficiently proved to be commonly admitted in evidence in the courts of Illinois, to justify the court below in allowing the same to be introduced upon the trial. See Code, § 3718.

AFFIRMED.

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 WILSON V. HARDESTY.

48	515
107	208
48	515
120	131
120	132

1. **Homestead: DOWER: MORTGAGE.** When a widow elects to take her distributive share under the law, and when such share embraces a part or all of the homestead, she does not surrender the right to have the property, other than that set apart to her, first exhausted in the payment of a mortgage lien upon the whole premises.



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 Wilson v. Hardesty.
 

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*Appeal from Jasper Circuit Court.*

FRIDAY, JUNE 7.

R. J. HARDESTY, deceased, was the owner of eighty acres of land, upon which he resided as his home. Esther A. E. Hardesty is his widow, and, since the death of her husband, she has continued to reside upon and occupy the homestead. Prior to the death of her husband, he and his said wife executed a mortgage upon all of said land, for the sum of seven hundred dollars, and interest.

Plaintiff, as executor of the estate of R. J. Hardesty, commenced this proceeding to sell the real estate of the deceased, to pay debts, and asked that the widow be compelled to elect whether she will take her rights under the law or under the will of the decedent, and that, after such election, her interest in such real estate be set apart to her, and the residue be ordered to be sold to pay the debts. Esther A. E. Hardesty appeared to plaintiff's petition, and elected to take her share as widow under the law, instead of under the will.

The court found that she was "entitled to have the undivided one-third of said real estate set apart to her, including the homestead, subject to the *pro rata* incumbrance of the seven hundred dollar mortgage, being the one-third of said mortgage, and that the administrator is entitled to sell the remainder of said real estate, incumbered with the two-thirds of said seven hundred dollar mortgage."

From this order Esther A. E. Hardesty appeals.

*Ryan Bros.*, for appellant.

*Smith & Wilson*, for appellee.

ROTHBROOK, CH. J.—Appellant claims "that she is entitled to have her interest in the real estate set off to her so as to include the ordinary dwelling-house given by law to the homestead, free from the mortgage debt,

1. HOMESTEAD:  
dower: mort-  
gage.

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Wilson v. Hardesty.

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provided the remainder of the realty included in the mortgage is sufficient to discharge it." It is claimed by the appellee, and was held by the court below, that, as appellee<sup>nt</sup> elected to take her distributive share as provided by law, she abandoned all other rights in the real estate, and takes the one-third, subject to the proper proportion of the mortgage incumbrance.

In the latter view we do not concur. It is true when appellant elected to take her share under the law she was entitled to take one-third in fee of such real estate, to which she had made no relinquishment of her right. Code, § 2440.

But the relinquishment by mortgage, if it may be called a relinquishment, could only affect the homestead so far as might be necessary to pay the remainder of the mortgage after exhausting the other property included in the mortgage. Code, § 1993. The execution of the mortgage was, then, at most, but a qualified or contingent relinquishment of her right in the land to the amount of the mortgage debt.

Section 2441 of the Code provides that the distributive share of the widow shall be so set off as to include the ordinary dwelling-house given to the homestead, and section 2451 provides that in case her distributive share cannot be readily divided, the court may order the whole to be sold, and one-third of the proceeds paid over to the widow, and with any money thus paid to her she may procure a homestead which shall be exempt from liability for all debts from which the former homestead would have been exempt in her hands.

We think these two sections clearly indicate that when a widow elects to take her distributive share under the law, and when such share embraces a part or all of the homestead, she does not surrender the right to have the property, other than that set apart to her, first exhausted in the payment of a mortgage lien upon the whole premises.

She takes her distributive share free of her husband's debts, and it so far retains its homestead character that the other property included in the mortgage in which she joined must

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The Bank of Montreal v. The C., C. & W. R. Co.

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be first exhausted. The conclusion we reach is not inconsistent with the cases of *Meyer v. Meyer*, 23 Iowa, 359, and *Butterfield v. Wicks*, 44 Id., 310. It is held in those cases that a widow or surviving husband cannot hold both dower and homestead in the real estate of the deceased husband or wife; that when the distributive share or dower embraces less than the homestead both cannot be claimed. In this case it is only determined that because the widow elects to take one-third in value, in fee, she is not thereby required to take it burdened with one-third, or any part of the mortgage, unless it should be necessary to resort to her share after exhausting the other mortgaged property.

REVERSED.

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48	518
118	703
48	518
121	12

THE BANK OF MONTREAL v. THE C., C. & W. R. CO. ET AL.

1. **Receiver; POWERS OF.** An order of court appointing a receiver of a railroad company provided that he should "do and perform all the acts and things necessary to be done and performed to construct and complete said line of railroad," and that he should be authorized to borrow such sums of money as were necessary for the further construction, equipment, and final completion of the road, and to issue his debentures or certificates therefor, and that such certificates, "whether for money borrowed, material furnished, labor performed, or on account of contracts made by him on account of the construction of the road," should be treated as receiver's indebtedness, and constitute a first lien on the road: *Held*, that the receiver was not authorized to issue certificates in payment of material until it had been furnished, and having issued his certificates for material contracted to be delivered, but which in fact never was, such certificates were void.
2. ———: ———: **NEGOTIABILITY.** Such certificates reciting upon their face that they were issued under an order of court, the holder was chargeable with notice of the order, and in taking them was bound to inquire whether the receiver had power to issue them in payment for material to be delivered at a future time.

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The Bank of Montreal v. The C., C. & W. R. Co.

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*Appeal from Clinton District Court.*

FRIDAY, JUNE 7.

THIS action was commenced by the Joliet Iron and Steel Company against the corporation defendant in November, 1875, to enforce an alleged lien. E. H. Thayer was appointed receiver of the company.

In July, 1876, the corporation, receiver, and certain other parties being represented and before the court, the following order was entered of record:

"That the said receiver be and is hereby authorized and empowered to proceed to complete and build all the unconstructed portions of the line of railroad of said Chicago, Clinton & Western Railroad Company, from Clinton, in Clinton county, Iowa, to Iowa City, in Johnson county, Iowa, and to put those portions of said line in good order and condition, to be operated as a railroad. All of said construction and work said receiver is authorized to have done directly under his own management, or by contract of the whole of said work, or in parts thereof as may be in his judgment most advantageous and expedient, and to do the same as early as practicable. And said receiver is further authorized and directed to do and perform all the acts and things necessary to be done and performed to construct and complete said line of railroad as above directed, and for such purpose the said receiver is hereby authorized and empowered to borrow, on such terms as to time of payment and rate of interest as in his judgment may seem advisable, such sum or sums of money, and to make such indebtedness, as shall be necessary for the further construction, equipment and final completion of said road, not to exceed eight thousand dollars per mile upon the whole line of said road, completed, and to be completed, and to make and issue to the person or persons of whom said money may be borrowed or to whom such indebtedness may be due, but only such as is incurred by said receiver, his debent-

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The Bank of Montreal v. The C., C. & W. R. Co.

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tures or certificates, with the interest expressed in their body, or in coupon or interest warrants attached, signed by him as such receiver, but not personally; and it is further ordered and decreed that such debentures and certificates issued by said receiver, in pursuance of the order herein made for the construction and completion of said road, whether for money borrowed, material furnished, labor performed, or on account of contracts made by him for or on account of the construction or completion of said road, or any part thereof, shall be, and they are hereby, adjudged to be and shall be held and treated as receiver's indebtedness, and as such are decreed and adjudged to be a first lien, for the principal and interest thereof, upon the entire line of said railroad, including the road-bed, iron, right of way, rolling stock, taxes, income and earnings of said road, and all the property, rights, interests and franchises of said railroad company now in existence or hereafter accruing or belonging to said railroad company prior to any other liens or claims thereon whatsoever."

Afterward the receiver, under said order, issued certain certificates, some of which having been acquired by the South St. Louis Iron Company, that company filed its petition of intervention to establish its lien, and have the property sold to satisfy the same.

In November, 1877, the plaintiff, claiming to be the owner of certain of said certificates, filed its petition of intervention asking the establishment of its lien, and that the property be sold to satisfy the same. The certificates owned by the plaintiff, amounting to twenty-five thousand dollars, were all of the form following:

**"RECEIVER'S CERTIFICATE.**

**"No. 28.**

**\$5,000.**

*"Office of the Receiver of the Chicago, Clinton & Western Railroad, Clinton, Iowa, January 20, 1877.*

*"This is to certify, that there is due on July 16, 1877, to the Joliet Iron and Steel Company, or bearer, from Edward*

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The Bank of Montreal v. The C., C. & W. R. Co.

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H. Thayer, as receiver (but not personally) of the Chicago, Clinton & Western Railroad, appointed by the District Court of the State of Iowa, in and for Clinton county, five thousand (5,000) dollars, with interest thereon from this date at the rate of seven per cent per annum, on account of indebtedness incurred by said receiver. This obligation is issued under and by virtue of certain provisions of an order duly entered by the District Court of Clinton county, Iowa, on July 27, 1876, and is one of the series of receiver's certificates authorized to be issued by such order, and by virtue thereof constitutes a first lien upon the said line of railroad, its appurtenances, franchises, and income, being for iron furnished for constructing said road. Payable at the Third National Bank, Chicago, Illinois.

"EDWARD H. THAYER,

"Receiver of the Chicago, Clinton & Western Railroad."

The answer to the petition of intervention of the plaintiff was filed by the South St. Louis Iron Company, alleging that the certificates owned by the plaintiff "were not issued by the receiver in payment of any money borrowed, nor in payment of any indebtedness due to the payee mentioned in said certificates, or any other person, but said certificates (and others of the same date) were issued and delivered to the Joliet Iron and Steel Company without any delivery of any of the property described in said contract to the receiver, and without any right existing for him to demand or receive any portion of said property, \* \* \* and that at the time said contract was made the Joliet Iron and Steel Company was, in fact, insolvent, and ever since has been insolvent."

A copy of the contract between the receiver and the Joliet company is attached to and made a part of the answer, from which it appears the contract was made in January, 1876, for the delivery of certain iron rails by the company to the receiver, in March, April and May, 1877. The certificates were issued on the same day the contract was entered into,

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The Bank of Montreal v. The C., C. & W. R. Co.

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in payment therefor, but no part of the rails were ever delivered or tendered to the receiver.

A demurrer to the answer was overruled, and plaintiff appeals.

*E. S. Bailey*, for appellant.

*Cook & Richman*, for the intervenor, appellee.

SEEVERS, J.—We have been advised that the authority of the court to make the order in question is denied by certain parties in interest who are not represented on this appeal, nor are we advised as to the facts and circumstances before the court when the order was made, therefore that question has not been considered.

1. RECEIVER:  
powers of.

The authority of the receiver to issue the certificates owned by the South St. Louis Iron Company is not questioned. The only contested matter before us is as to his authority to issue and the validity of those owned by the plaintiff. A solution of this question requires a consideration, to some extent at least, of the nature and extent of the powers of a receiver, and the construction of the order of the court.

Counsel for the appellant insist that, if a court undertakes to build a railroad by an order entered of record, and directs a receiver to superintend such construction, and authorizes him to do and perform all acts and things necessary to be done to build the road; to borrow money, make contracts, incur debts and issue certificates; that such order would be subject to the same rules of construction as a like power granted by the board of directors to a superintendent of construction. The correctness of this proposition, thus broadly stated, admits of serious doubt.

Ordinarily the duties of a receiver of a railroad only "comprise the operation and management of the road, the payment of current expenses, and the application of the residue of the earnings and receipts to the extinguishment of the indebtedness, to secure which the receiver was appointed.

The receiver is seldom authorized to enlarge the operations of the company, or to extend its line of road, his functions being usually limited to the management of the property in its existing condition, for the protection of creditors, and subject always to the supervision of the court." High on Receivers, § 390.

As to such matters the receiver, no doubt, possesses all the incidental and necessary power to effectuate the object of his appointment, in the absence of any specific direction from the court. The details of the business intrusted to him must of necessity be left to his discretion. But he is uniformly regarded as an officer of the court, and, being such, the fund or property intrusted to his care is regarded as in the custody of the law, the "court itself having the care of the property by its receiver, who is merely its creature or officer, having no powers other than those conferred by the order of his appointment, or such as are derived from the established practice of courts of equity." High on Receivers, § 1.

In construing the order it must be borne in mind it confers upon the receiver extraordinary and unusual powers, which, however, it will be assumed were necessary and proper for the preservation and protection of the property committed to his charge.

He was authorized to "put those portions of said line already constructed or partly constructed in good order and condition, and to this end he was empowered to borrow money and incur indebtedness which was made a 'first lien' on the entire line of said railroad, including the road-bed, right of way, rolling stock, taxes, income and earnings of said road," including all after acquired property.

Under such a grant we are constrained to believe the claimed right or power should appear in express terms, or possibly it would be sufficient if it appeared by necessary implication.

Now, while it is true the receiver is authorized to "do and perform all the acts and things necessary to be done and



performed to construct said line of railroad," yet the means to this end, as we think, are fixed and defined in the order. "For such purpose" (the construction contemplated) the receiver is expressly authorized to issue certificates "for money borrowed, material furnished, labor performed, or on account of contracts made by him for or on account of the construction or completion of said road, or any part thereof." The receiver, being an officer of the court, has no implied powers other than those derived from the order of the court. Such being true, we think it clear he could not issue certificates which would constitute a first lien on the road, except for money borrowed, material furnished, or labor performed. When the material was furnished or labor performed he was authorized to issue the certificates in payment therefor, and not until then. And if he made a contract for the construction of the road he might issue certificates as the material was furnished or the labor performed, and on the completion of the road he could issue his certificate in final payment. But the power is not conferred to issue certificates in payment for material not furnished, or labor not performed. On the contrary, we are of opinion, it fairly appears he was prohibited from so doing. If the necessity existed for enlarged powers they should have been applied for. Cases have been cited by counsel where courts have expressly authorized their receivers to issue negotiable securities. But such are not applicable.

It is insisted, however, that the certificates are negotiable, and, as the plaintiff is an innocent holder for value, they are  
2. —; —: not subject to the equities between the parties  
negotiability. thereto. No adjudicated case precisely in point has been cited by counsel.

As the certificates on their face state they were "issued under and by virtue of certain provisions of an order duly entered by the District Court of Clinton county, Iowa, on July 27, 1876," the plaintiff is chargeable with notice of all such order contains. Whether, under the order, the receiver

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Miller v. Corbin.

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had the power to issue negotiable securities, or for property agreed to be delivered at a future day, were legal questions which the plaintiff was bound to determine at its peril. The receiver's authority was bounded and limited by the order. He had no general powers, except such as could be derived therefrom. It is true he had the power to issue certificates, but this was not unlimited. It was only in certain cases he could do so. And being an officer of the court, intrusted with the care of property in his charge as such officer, we think the plaintiff was bound to know whether these certificates were issued in accordance with the terms and contingencies contemplated by the order.

We conclude, therefore, that plaintiff is not such a holder as will cut off the equities existing between the original parties to these certificates.

**AFFIRMED.**

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**MILLER V. CORBIN ET AL.**

- 1. Tax Sale: RECOVERY OF AMOUNT PAID: PRACTICE.** Where, in an action by a tax purchaser to quiet his title, he alleged in his petition that he had paid the taxes for certain years, but did not allege the amount so paid or ask judgment therefor, and it was held in the Supreme Court on appeal that the tax purchaser had the right to recover the taxes, penalties, and interest, the defendant was entitled upon a reversal of the case to file proper pleadings and introduce competent evidence contesting the right of the plaintiff to recover the amount paid by him for taxes.

*Appeal from Hardin Circuit Court.*

**FRIDAY, JUNE 7.**

THIS cause has already been before this court. See 46 Iowa, 150. Upon the former appeal there was a trial *de novo*. The main question was as to the validity of a certain tax title held by the plaintiff. Said title was held invalid by the court below, and upon that issue the decree was affirmed.

It was claimed by plaintiff that he paid the taxes on the land in controversy for a number of years, but no statement was made in the pleadings of the times or amounts of such payments. Upon the trial the plaintiff introduced a certificate of the treasurer of Hardin county, stating that the plaintiff paid all the taxes on the said land for the years from 1861 up to 1874, both included. The court, by its decree, appointed a commissioner to report the amount of taxes so paid and the date of the respective payments, and adjudged that the plaintiff have his lien upon the land for the sum so paid, and six per cent per annum interest. This court held that plaintiff was entitled to recover a sum equal to the amount that the defendant would have had to pay the treasurer to satisfy all the taxes, penalties and interest if they had not been paid by the tax sale purchaser. There was no evidence before this court by which the proper amount could be determined, and the cause was remanded to the court below "for the determination of the amount which plaintiff is entitled to recover, and for a judgment therefor."

After the cause was remanded, plaintiff filed a motion in the court below for the appointment of a commissioner to ascertain the amount of taxes paid and the penalties and interest.

A commissioner was accordingly appointed. Defendants appeared to the motion after the commissioner was appointed, and asked leave to file an answer controverting the right of plaintiff to recover any of said taxes, and raising the statute of limitations. The court refused to allow said answer to be filed. The defendants then appeared before the commissioner and offered to disprove the payment of any taxes by plaintiff, and offered other evidence in defense of said claim. Said offers were refused by the commissioner, and defendants were not allowed to introduce any evidence.

The commissioner found the total amount of taxes paid by plaintiff, with interest and penalties, to amount to five hundred and thirty-eight dollars and twenty-three cents, for

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 Miller v. Corbin.
 

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which the court rendered judgment against defendants, and made the judgment a lien on the land in controversy, which consisted of eighty acres of wild prairie. Defendants appeal.

*Brown & Campbell*, for appellants.

*Dosh Bros. & Carstens*, for appellee.

ROTHROCK, CH. J.—The controversy between the parties on the former trial was one relating to the title. The only

reference to the taxes in plaintiff's pleadings were the following remarks in an amended petition:

1. TAX SALE: recovery of amount paid: practice. "5. The land in controversy was open prairie at the time of the tax sales. Plaintiff took possession of the land under the treasurer's deeds, on the 6th day of April, 1866, and maintained such possession by paying all the taxes due on the land for the years 1860 till 1874, both included.

"6. Plaintiff's possession continued uninterruptedly from the time of said April 6, 1866, till December, 1874, by payment of such taxes, and defendant's counter-claim is therefore barred under the statute of limitations."

Upon the trial, when plaintiff contested the right of defendant to question the tax title until he had paid the taxes, defendant made the following offer: "He avers that for some years the plaintiff claims to have been in possession of the said land; the defendant asks for an account of the rents and profits, and avers that he is ready and willing to pay the taxes and interest, and any balance found due after such accounting is had."

It will readily be perceived that the plaintiff pleaded the payment of tax as showing that he was in possession of the land. No amount of such payments was stated, and no claim for interest or penalties was made, and there was no demand for judgment. No evidence was introduced excepting the certificate of the treasurer stating that E. H. Miller paid all the taxes on the said land for the years from 1861 up to 1874.

This item of evidence (conceding it to have been compe-

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Cibula v. Pitt's Sons' Manufacturing Co.

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tent, but which we do not decide) gave the court no aid in arriving at the amount due the plaintiff. It appears to have been a mere general statement of the fact that Miller paid the taxes. It does not appear that the commissioner appointed on the first trial, to ascertain the amount of taxes, performed that duty before the decree was entered. He was appointed by the final decree.

Under these circumstances we think it was the right of the defendant to appear in the court below when the cause was remanded, and contest the claim of plaintiff for taxes paid.

When the cause was reversed, and remanded to the court below, to determine the amount due the plaintiff for taxes paid, there could be no determination of the amount without proper pleadings and competent evidence. It involved a new trial as to the claim for taxes paid by plaintiff.

REVERSED.

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89 485  
48 528  
d107 413

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CIBULA ET AL. V. PITT'S SONS' MANUFACTURING CO.

1. **Practice: FILING OF PETITION.** If a petition be not filed by the date fixed in the notice, the action is to be deemed discontinued.
2. ———: ———: **APPEARANCE.** The appearance of the defendant for the purpose of presenting a motion to discontinue the cause will not waive the defect resulting from the failure to file the petition in time.

*Appeal from Tama Circuit Court.*

FRIDAY, JUNE 7.

THE original notice in this action, which was duly served, recites that the petition would be on file November the 20th; it was filed November the 22d. The defendants moved to dismiss the petition, for the reason that it was filed after the time specified in the notice. The motion was overruled, and

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Cibula v. Pitt's Sons' Manufacturing Co.

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judgment was rendered against defendants. From this ruling and judgment defendants appeal.

*Struble & Kinne*, for appellants.

*Jacob W. Lamb*, for appellees.

BECK, J.—I. Code, § 2600, provides that if the petition be not filed by the date fixed in the notice, and ten days before the term, "the action will be deemed discontinued."

1. PRACTICE:  
filing of peti-  
tion.

This language is imperative, and unless the defendant waive the non-compliance with the terms of the notice the action must be discontinued. See *Hudson v. Blaufus et al.*, 22 Iowa, 323.

II. Did the appearance of the defendant, for the purpose of presenting the motion to discontinue the cause, waive the defect resulting from the late filing of the petition?

2. —: —: appearance.  
The language of section 2600 being imperative, no waiver will be presumed from the special appearance for the purpose of the motion, unless it has that effect under a statute. Surely it is inconsistent with the rules governing the practice of the courts to hold that a defect in proceedings, which the imperative language of the statute declares shall work a discontinuance of the case, is waived by the party entitled to take advantage thereof, by his raising an objection thereto. We know of no statute prescribing such a rule.

A different view has been advanced which is, apparently, based upon the following language of Code, § 2626: "An appearance, special or other, to object to the substance or service of the notice, shall render any further notice unnecessary, but may entitle the defendant to a continuance, if it shall appear to the court that he has not had the full timely notice required of the substantial cause of action stated in the petition."

This provision is applicable to cases wherein there are objections to "the substance or service of the notice." The

The State v. Bruce.

thought of the Legislature was, that if the notice, though defective, should bring the defendant into court, he should be held to appear to the action. The provision is, therefore, reasonable.

But the objection in this case is not to "the substance or service of the notice;" it is to a proceeding after service and contemplated by the notice. The notice and service are perfect, and are sufficient to bring the defendant into court. Upon his appearance it is disclosed that an irregularity exists which the statute (Code, § 2600) declares shall operate to discontinue the action. It cannot, surely, be claimed that the provision, section 2626, intended to secure the appearance of defendant upon a defective notice, will so operate that defendant shall be presumed to waive an irregularity subsequent to the notice by objecting thereto. Such a construction would make it a statute of *jeofails*, more comprehensive than has ever been devised.

We are of the opinion that the Circuit Court erred in overruling defendant's motion.

REVERSED.

### THE STATE v. BRUCE.

1. **Criminal Law : INSANITY.** To entitle the defendant in a criminal case to an acquittal, it is only necessary that the jury should be reasonably satisfied he was insane. If the weight or preponderance of evidence shows the insanity of the defendant, it raises a reasonable doubt of his guilt.
2. ———: **QUALIFICATION OF JUROR.** A juror upon *voir dire* said: "I read an account of this matter in the papers, and came to the conclusion that defendant shot McNamara, and that it was a criminal thing for him to do. \* \* \* I have not formed such an opinion of the guilt or innocence of the accused as would prevent me from rendering a true verdict." *Held*, that the juror had not formed such an unqualified opinion as would render him incompetent.

48	530
78	973
48	530
89	36
48	530
102	30
48	530
106	647
48	530
109	652
48	530
119	661
48	530
121	398
48	530
126	463
48	530
130	60
48	530
135	724

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The State v. Bruce.

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3. ———: JURY: USE OF INTOXICATING LIQUORS. The use of intoxicating liquors by members of the jury pending the trial, and before the final submission of the case, in the absence of a showing that prejudice to the defendant resulted therefrom, will not vitiate the verdict.
4. Practice: TRIAL: ORDER OF TESTIMONY. The order in which testimony shall be introduced rests largely in the discretion of the trial court, and the exercise of that discretion will not be interfered with, save upon the clearest showing that it has been abused.

*Appeal from Lee District Court.*

FRIDAY, JUNE 7.

THE defendant was indicted for the murder of Michael McNamara. He was found guilty of murder in the first degree, and by the judgment of the court was sentenced to the penitentiary for life, from which judgment he appeals. The facts necessary to an understanding of the questions made appear in the opinion.

*Miller & Sons and Craig & Collier, for appellant.*

*J. F. McJunkin, Attorney General, and D. N. Sprague, District Attorney, for the State.*

ROTHROCK, J.—I. The defendant did not deny the homicide imputed to him, but rested his defense upon the ground of insanity at the time the alleged criminal act was committed. It was also urged that, if his mind was not so diseased as to entirely excuse him from the legal consequences of the act, yet he labored under such mental disorder as to reduce the offense to murder in the second degree, or manslaughter.

It appears, from the evidence, that the defendant and the deceased were well acquainted with each other, and had been on terms of friendship. On the morning of the day of the homicide the defendant, in passing the deceased's grocery store, asked him to cash a note. Deceased refused to do so, and said to defendant that he did not want him to say anything more to him about that note—that he wanted to hear



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The State v. Bruce.

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nothing more about it. The defendant became very angry at the deceased, and went rapidly toward his home. In a short time he returned to the deceased's grocery, and appeared to be looking for some one. The deceased, at that time, was concealed in the cellar. Defendant went away, and again returned to the grocery. Deceased concealed himself under the counter. He returned the third time, but did not find the deceased. After these visits, the defendant was searched by the city marshal, who found a revolver upon his person, which he took from him, and a friend of the defendant conducted him to his home. Afterward, the defendant left his home, went to a store, purchased a revolver and a box of cartridges, and went directly to the deceased's store and shot him with the revolver so purchased. After shooting the deceased, the defendant ran up street, and went into the house of one Johnson, where he was found by the city marshal, in a closet up-stairs. The marshal searched him, and found upon his person a revolver, a dirk-knife, and part of a box of cartridges. The first meeting of the parties on that day was at about six o'clock in the morning. The fatal shot was fired in the dusk of the evening.

We have detailed these undisputed facts to show that the circumstances attending the homicide were such that, if the defendant had sufficient mental capacity to be held criminally responsible for his acts, the crime was murder in the first degree. It could not have been less. The deliberation and the intent to kill were so manifest that, conceding the defendant to have been a responsible moral agent, his act was murder in the first degree. And here we may as well remark that, as there was evidence tending to show that defendant was intoxicated from the use of spirituous liquors upon the day of the homicide, the circumstances attending the act so conclusively show that such intoxication, of itself, was not sufficient to deprive him of the power to deliberate upon the act, and form the criminal intent, that no jury would be justified in finding to the contrary. Unless the

## The State v. Bruce.

intoxication was so great as to deprive the defendant of the power to deliberate, and form the guilty intent, it was no excuse or palliation for the act. "For an act designedly perpetrated, although done when drunk, the law holds the perpetrator to the same responsibility as if done when sober." *People v. Hammill*, 2 Parker, 223.

The real inquiry upon this branch of the case is, was this homicide the deliberate act of a murderer—was it the act of a person of sound mind, or was it the offspring of a mind so diseased as to be incapable of determining the moral quality of the act, and refraining from its commission? The jury found the defendant guilty of murder in the first degree. Under the rule adopted in this State, and followed by the court below in the instructions to the jury upon the question of insanity, we think the verdict was fully supported by the evidence. We will make further reference to this rule presently. A discussion of the evidence in detail would serve no useful purpose.

II. The defendant asked the following instruction, which was refused:

"In this case, where the defense of insanity is set up, it does not devolve upon the defendant to prove that he is insane by a preponderance of the evidence; but if, upon the whole of the evidence introduced on the trial, together with all the legal presumptions applicable to the case under the evidence, there should be a reasonable doubt as to whether the defendant is sane or insane, he must be acquitted."

The court instructed the jury upon this branch of the case as follows:

"25. The plea of insanity is a complete excuse for the crime charged, if from all the evidence you believe the plea is sustained. The law presumes all men sane until insanity is established by competent evidence to the satisfaction of the jury."

1. CRIMINAL  
law: insanity.

"26. It is not necessary, in order to acquit, that the evidence on the subject of insanity should satisfy you beyond all reasonable doubt that the defendant was insane; it is sufficient if, upon consideration of all the evidence, you are reasonably satisfied that he was insane. If weight or preponderance of the testimony shows the insanity of the defendant, it raises a reasonable doubt of guilt."

The rule of the instructions given by the court was the same which was approved by this court in the case of *The State v. Felter*, 32 Iowa, 49, and followed in the case of *State v. McWherter*, 46 Iowa, 88. We see no sufficient reason for overruling these cases.

III. Exceptions were taken to the twelfth and fourteenth instructions given by the court to the jury. We need not repeat these instructions. They embody the rule as to the degree of insanity necessary to acquit, which was adopted by this court in the case of *The State v. Felter*, 25 Iowa, 67, and with that rule we are content.

IV. Upon the impaneling of the jury, George Roberts <sup>2. — : qualification of juror.</sup> was called as a juror, and being sworn to answer questions, testified as follows:

"I read an account of this matter in the papers, at the time it occurred, and came to the conclusion that defendant shot McNamara, and that it was a criminal thing for him to do. At the time I read it I thought it a horrible thing for him to do. It created an impression on my mind. It was a criminal thing for him to do so."

To the court and district attorney:

"Have no bias against defendant. Believe I can hear the testimony, and fairly and without prejudice determine, on the testimony now, the guilt or innocence of the defendant, irrespective of what I read in the papers. Have not formed such an opinion of the guilt or innocence of the defendant as would prevent me from rendering a true verdict."

Substantially the same testimony was given by others who were called as jurors. The defendant "challenged each of

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The State v. Bruce.

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said jurors for cause, on the ground that the constitution of this State provides that each person tried for a public offense shall have an impartial jury, and the jurors challenged had prejudged the case."

The court overruled the challenges, and exceptions were taken by the defendant.

Counsel for appellant argue this point upon the theory that the jurors stated, in answer to questions propounded to them, that they had formed an unqualified opinion upon the guilt of the defendant. It will be seen that the juror did not state that he had formed such opinion.

The Revision of 1860, § 4771, provided that a challenge might be taken to any juror who had "formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged." Counsel concedes that this section of the statute did not prevent a defendant from obtaining an impartial jury, although the jurors may have formed hypothetical opinions based upon what they had heard or read.

The Code, § 4405, provides that a juror may be challenged for "having formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent him from rendering a true verdict upon the evidence submitted on the trial."

It cannot be claimed that this provision of the statute prevents a party from obtaining an impartial jury. If the statute be followed, it will exclude all partial, biased and prejudiced jurors, by selecting such as will render a true verdict on the evidence submitted on the trial.

These jurors all answered that they could hear the evidence and render an impartial verdict, without being biased or prejudiced by what they had heard or read in newspapers. It does not appear that any one of them had any personal knowledge of any fact connected with the case. Whatever opinion they had formed was based upon mere hearsay. Taking into consideration the character of the evi-

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The State v. Bruce.

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dence upon which the jurors formed such opinions as they had, together with their statements under oath that they could determine the guilt or innocence of the defendant upon the evidence submitted to them, irrespective of what they had heard or read, we think the court properly overruled the challenges.

That an opinion, however strong it may be, founded upon newspaper reports, or other hearsay evidence, will prevent a juror from rendering an impartial verdict, we do not believe. Men of sufficient intelligence and capacity to properly discharge the duties of jurors can certainly divest their minds of any opinion founded upon hearsay, and determine the guilt or innocence of the accused upon the evidence produced upon the trial, and on that alone. It would be a reproach upon the administration of justice to require jurors to be selected from that class of persons who do not or cannot read the current events of the day, and are totally ignorant of what is transpiring around them, or from that other class, if such there be, who, having read, have no opinion upon the subjects about which they read. See *State v. Lawrence*, 38 Iowa, 51.

V. In the progress of the trial an order was made by the court that the jury should be kept together, and not allowed to separate. During the time they were thus required to be kept together, and before that time, certain jurors, at different times, drank intoxicating liquors during the adjournments of the court. The most of such drinking occurred between the adjournment on Saturday evening and the convening of court on Monday morning. No drinking of intoxicating liquors was indulged in by the jury while engaged in deliberating upon the case. It does not appear that any intoxication was produced by the drinks taken by any juror. On the contrary, certain affidavits which were taken show that the minds of such of the jurors as indulged in drinking were not affected thereby. It

3. ———:  
 jury : use of  
 intoxicating  
 liquors.

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The State v. Bruce.

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is claimed that the verdict should have been set aside for this misconduct of the jury.

The jurors may have been guilty of a contempt of the court for drinking intoxicating liquors as a beverage while they were required to be kept together, yet we do not think, in the absence of a showing of intoxication as the result of the drinking, that there should be a reversal of the judgment on this ground.

It was held, in *The State v. Baldy*, 17 Iowa, 39, and in *Ryan v. Harrow*, 27 Id., 494, that where jurors indulged in the use of intoxicating liquors after the cause was finally submitted to them, and while they were deliberating upon the case, it was such misconduct as vitiated the verdict, and the use of it in any degree was of itself conclusive evidence of prejudice to the unsuccessful party. We adhere to the rule announced in those cases.

In the case of *Van Buskirk v. Dougherty*, 44 Iowa, 42, it was held that where a juror drank intoxicating liquors during the adjournment of the court and before the cause was finally submitted to the jury, it was not error for the court to overrule a motion to set aside the verdict grounded upon such alleged misconduct, in the absence of a showing of intoxication or prejudice resulting from the indulgence.

There is a wide distinction between the duty of a juror during the adjournment of court pending the trial, and his duty after the case is submitted to him for his determination. Section 4435 of the Code requires that the court, upon an adjournment, must admonish the jury "that they should not converse among themselves on any subject connected with the trial, or form or express an opinion until the cause is finally submitted to them." This requires them to keep their minds in *statu quo*, so to speak, during the progress of the trial, so far as the merits of the case are concerned. If, during the adjournment of the court, they do no act which impairs the mind or clouds the understanding, when again called to

hear the evidence or arguments of counsel, we think it cannot be said there was misconduct to the prejudice of any one. When the cause has been finally submitted, the parties have the right to the calm, deliberate, and sober consideration of the jury, and any conduct which tends to impair this right may well be said to be prejudicial.

An examination of the numerous cases cited in argument has led us to the conclusion that when the indulgence in intoxicating drinks occurs during the adjournment, and before the cause is finally submitted to the jury, the better rule is, in the absence of a showing of prejudice, that the verdict should stand, and we think there is no good reason for making any distinction between civil and criminal causes in the application of the rule.

VI. Exceptions were taken because the State was allowed, against defendant's objection, while upon the trial: order of testimony. rebuttal, to introduce evidence in chief, and also to the refusal of the court to permit the defendant to introduce certain evidence.

The order in which evidence is allowed to be introduced is a matter so much in the discretion of the court that we would not be justified in interfering, unless upon the clearest showing of prejudice, and we find none in this case. The refusal of the court to allow defendant to introduce certain evidence was during what is denominated in the abstract as the "surrebuttal by defendant." It appears to us that the evidence offered was evidence in chief, and this would justify the ruling of the court.

In conclusion, we cannot but admire the zeal and ability with which the learned senior counsel for the defendant has followed the fortunes of his client to the last, but we are of opinion that the appellant has had a fair and impartial trial, and that the judgment is just.

**AFFIRMED.**

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The State v. Bruce.

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## ON REHEARING.

SEEVERS, J.—So much of the foregoing opinion as holds the verdict should not be set aside because the jury, or some of them, drank intoxicating liquors during the trial, but before the cause was finally submitted to them, has been sharply criticised in a petition for a rehearing.

The confidence seemingly exhibited by counsel has induced us to re-examine this question with the care its importance demands. If we understand counsel, it is claimed the decided weight of authority is against the rule of the opinion. This we regard as a grave error, into which counsel have fallen through perhaps commendable zeal for their client.

The rule of the opinion is sustained by *Van Buskirk v. Dougherty*, 44 Iowa, 42; *Wilson v. Abrahams*, 1 Hill, 207; *Purinton v. Humphreys*, 6 Maine, 329; *Davis v. The People*, 19 Ill., 73; *The State v. Upton*, 20 Mo., 397; *Stone v. The State*, 4 Humph., 27; *Thompson's Case*, 8 Gratt., 637; *Coleman v. Moody*, 4 Hen. and Mun., 1; and, if cider be classed as intoxicating, by *The Commonwealth v. Roby*, 12 Pick., 494.

In *The State v. Sparrow*, 3 Murphey, 487, and *Rowe v. State*, 11 Humph., 496, intoxicating liquors were drank by the jury after they had retired to consider of their verdicts. The verdicts were sustained.

In *Pope & Jackson v. The State*, 36 Miss., 121, and *Gilmanton v. Hann*, 38 N. H., 108, intoxicating liquor was drank by one of the jurors as a medicine, and the court refused to set aside the verdict.

In *The People v. Douglass*, 4 Cow., 26, the verdict was set aside because some of the jury drank such liquors during the trial and before the cause was finally submitted to them; and in *Brandt v. Fowler*, 7 Cow., 562, the jury, at the conclusion of the charge, were permitted by the court to go out before retiring to their room; during that time some of the jury drank intoxicating liquors and the verdict was set aside. This last case is overruled by the subsequent case of *Wilson*



*v. Abraham*, before cited, and, while the court attempts to distinguish *The People v. Douglass*, we regard it as an entire failure. The latter case should, we think, be also regarded as overruled, and such was our view in *Ryan v. Harrow*, 27 Iowa, 494, and it was so regarded in *Jones v. The State*, 13 Texas, 168.

In the following cases the verdicts were set aside because the jury, or some of them, drank intoxicating liquors after they had retired for the purpose of considering as to their verdict. *The State v. Baldy*, 17 Iowa, 39; *Ryan et al. v. Harrow et al.*, 27 Id., 494; *The State v. Bullard*, 16 N. H., 139; *Leighton v. Sargent*, 31 N. H., 119; *Jones v. The State*, 13 Texas, 168; and *Grigg v. McDaniel*, 4 Harrington, 367.

In *Dennison v. Collins*, 1 Cow., 111, the trial was suspended for two hours, and during that time, but not within one and a half hours of the time it was resumed, the jury drank intoxicating liquors. The verdict was sustained.

When called into the box, one of the jurors was intoxicated, and the court, on its own motion, directed him to stand aside. This was sustained on appeal. *Bullard v. Spoor*, 2 Cow., 430.

During the trial the jury drank spirituous liquors, and one of them was "disguised with liquor." The verdict was set aside. *Rose v. Smith*, 4 Cow., 17.

These last cases are somewhat exceptional, but they are in accord with the spirit and rule of the opinion.

We have examined and cited, we believe, all the cases to which our attention has been called, and it will be seen the opinion is in accord with the decided weight of authority.

In truth, there is not a single adjudicated case in which a contrary rule has been sanctioned, except the two overruled cases in Cowen. Nor will it do to say, in view of the citations we have made, that there is a distinction between civil and criminal cases.

No doubt there can be found, in some of the opinions, suggestions and illustrations used by way of argument, which,

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 Stinson v. Richardson.
 

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at the first glance, seem to be opposed to the rule of the opinion. But all such must be regarded as *dicta*.

In view of the overwhelming weight of authority in support of the opinion, we deem it unnecessary to vindicate or support it by argument, which, however, we believe could be readily and satisfactorily done.

The petition for a rehearing is

OVERRULED.

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STINSON V. RICHARDSON ET AL.

1. **Homestead : DISCHARGE OF LIEN :** S., having a bond for a deed of land in which his homestead was included, made an assignment thereof to R., the wife refusing to join in the assignment. There were prior judgment liens upon the property which R. discharged, and he then came into possession of a part of the property: *Held*, that the amount due from R. for the rent of the homestead, or so much thereof as he occupied, should be applied in reduction of his lien for the judgments.
2. — : **TAX TITLE.** R., being in possession under an agreement to pay all back taxes, could not acquire a tax title on the property, and was entitled to recover only the amount paid by him, with six per cent interest.

*Appeal from Boone Circuit Court.*

FRIDAY, JUNE 7.

For a history of this case, prior to the commencement of the present proceeding, reference is made to a former appeal. See *Stinson v. Richardson et al.*, 44 Iowa, 373. On the plaintiff's appeal the decree was modified. The *procedendo* was filed in the Circuit Court February 14, 1877. On the 31st of March, 1877, the plaintiff filed in the Circuit Court her supplemental petition, alleging "that the defendant had the possession of all the land since the former trial, and had the use of it, which was worth seventy-five dollars, and had cut trees and removed rails, and had wilfully damaged the build-

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Stinson v. Richardson.

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ings and other improvements thereon, to the extent and value of all of which should be applied as of the proper date to extinguish his lien upon her homestead." The defendant answered as follows :

"1. Admits possession of part of the land, but the rent was only worth fifty dollars per year.

"2. That he cut some trees not worth over three dollars.

"3. Denies everything else in the petition.

"4. That the items set up in the supplemental petition should not be set off against the homestead liens, because they do not belong to plaintiff, and she has no interest therein, and specially pleads that she cannot recover for waste, etc., on that part of the land not included in the homestead.

"5. That when his contract to purchase the land from plaintiff's husband was revoked he procured tax title certificates on the land, had them conveyed to W. L. Defore, and on October 17, 1873, Defore procured treasurer's tax deeds for said land, and that he has been in possession under those deeds, and that he has paid taxes, but cannot state the amount."

For equitable defense, he says that in April, 1872, as part of the purchase price of the land in suit, he satisfied his judgments of record. The defendant prays that the tax title deeds be held valid, and, if not held valid, that an accounting may be had, and he have the taxes and penalties thereon, and that the satisfaction of the judgments be set aside and sale ordered.

Defore filed an intervening petition alleging that, October 24, 1873, he procured treasurer's tax deeds for the land in suit for the benefit of defendant Richardson, who has paid him all money expended, and, by his consent, has been in possession of the premises ; that he has no personal interest herein, except so far as he has assumed to act for Richardson, and asking that the tax deeds be established and confirmed, and, if that cannot be done, that he have all the rights the county would have to collect taxes with penalties.

The plaintiff replied, alleging :

"1. That the matter of the tax title has already been adjudicated and settled.

"2. That in April, 1872, Richardson agreed with James Stinson to pay all the taxes on that land, and to redeem it from tax sale ; that Stinson then delivered Richardson a horse worth seventy-five dollars to apply on such contract or bargain, and he has kept and never accounted for the horse, and has had said horse or its value in his hands all the time the tax title was enuring ; that Richardson has been in possession of the land, claiming it adversely to plaintiff, and has had the full use and enjoyment of said land, and it was his duty to pay said taxes, and prevent the tax deeds from enuring.

"3. That to her prejudice her husband, James Stinson, refused to make any defense to the claims of Richardson, and she asks that she may defend, to protect her own rights and interest in the premises."

The cause was tried by the court, and a decree was entered as follows :

"1. Allowing plaintiff to be credited, on the lien on the homestead, rent and damages occurring since the former decree, deducting therefrom the money Richardson had paid for the tax sale certificates, with six per cent interest on each payment from its date, the sum equaling sixty-four dollars and seventy-five cents, but refused to allow rent and damages on the other twenty acres."

To this plaintiff excepted.

"2. Holding and declaring the tax title deeds invalid to pass title to Defore, but treating the same as payment by Richardson on the contract."

To this defendant excepted.

"3. Refusing to allow plaintiff anything in the accounting for the horse her husband delivered to Richardson on the trade, when it was made, in April, 1872."

To this the plaintiff excepted. Both parties appeal.

*Hull & Ramsey*, for plaintiff.

*Kidder & Crooks* and *D. R. Hindman*, for defendant.

DAY, J.—I. In April, 1872, James Stinson, husband of plaintiff, held a bond from one Dawkins for a conveyance of  
1. HOMESTEAD: sixty acres of land, upon which Stinson had paid  
discharge of  
lien. one thousand two hundred dollars or one thousand four hundred dollars, the proceeds of a former homestead. Dawkins had obtained judgment against Stinson for the balance due. Jesse Stinson and Frank Richardson also had judgments against James Stinson. James Stinson assigned the Dawkins bond to Richardson, the plaintiff, his wife, refusing to concur. In consideration Richardson agreed to pay the Dawkins judgment, the Jesse Stinson judgment, all back taxes, a team of horses and five dollars in money, and to release his own judgment. Stinson agreed to let Richardson have a horse worth sixty dollars to seventy-five dollars. The plaintiff refusing to concur in the sale, Richardson did not deliver the team. Richardson retained the horse Stinson let him have, paid the Dawkins and the Jesse Stinson judgments, and took possession of the land, except one house and a small garden spot. On the former trial the assignment as to the forty acres was set aside. Richardson was allowed for improvements thereon, and was charged with rents thereof, and the Dawkins judgment and part of the Jesse Stinson judgment were declared a lien on the whole sixty acres in favor of Richardson, who had paid them. The plaintiff now claims that the rents of the whole sixty acres, since the former trial, should be applied to diminish Richardson's lien for the judgments paid. The court allowed plaintiff's claim as to the forty acres, the homestead, but denied the claim as to the remaining twenty acres. From this decision plaintiff appeals. In this respect the decree of the court below was right. The sale of the twenty acres was not

affected by the former decree. Defendant was in possession of that under his purchase, which still remains undisturbed, and he ought not to be required to apply the rents and profits in extinguishment of his lien.

II. The defendant Richardson, being in possession of all the land under his contract of purchase, furnished a. ———: tax title. Defore money to buy in, for his use, certificates of tax sale on the land. Tax deeds have now been executed, and under these defendant insists that he is entitled to the land, or at least to the amount expended, with the ordinary penalties which would be due the county if the taxes had not been paid. The court allowed defendant the amount paid, with six per cent interest. From this judgment the defendant appeals. We think this action of the court is also correct. The defendant was in possession under an agreement to pay all back taxes. The amount which he paid for certificates of purchase should be treated simply as so much paid in compliance with the terms of the contract upon his part, and for that sum, with six per cent interest from the time of payment, he was properly allowed.

III. The defendant refused to deliver the team because plaintiff would not ratify the contract. Stinson let defendant have a horse, under the agreement, and he still retains the same. The plaintiff asks that the value of this horse be applied in discharge *pro tanto* of defendant's lien upon the homestead forty. We think plaintiff is entitled to this relief. Defendant has paid nothing but the judgments, and for them he has been subrogated to the lien of the holders of the judgments. It is true the horse belonged to plaintiff's husband. She could not, in a direct action therefor, recover its value, but she is entitled to protect the homestead, and, in the event of the failure of her husband to do so, she may insist upon a proper allowance for all sums which should equitably go to release the lien upon the homestead. As defendant did not deliver the team, he ought to account for the value of the

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 Twogood & Elliott v. Reily.
 

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horse. Upon plaintiff's appeal the cause is reversed and remanded with directions to apply the value of the horse in reduction of the judgment liens.

REVERSED.

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TWOGOOD & ELLIOTT V. REILY ET AL.

1. **Practice in the Supreme Court: TRIAL DE NOVO.** To entitle the appellant to a trial *de novo* in the Supreme Court, the provisions of section 2742 of the Code must be complied with. If they are not, the case will be reviewed on appeal only upon the errors assigned.

*Appeal from Linn Circuit Court.*

SATURDAY, JUNE 8.

THIS is an action in equity for the foreclosure of an alleged mortgage. The instrument claimed by plaintiff to be a mortgage was in the form of a warranty deed. Defendants claimed it was in fact a warranty deed, and conveyed the title. There was a decree for the defendants. Plaintiffs appeal.

*J. B. Young*, for appellants.

*Hubbard, Clark & Deacon*, for appellees.

ROTHROCK, CH. J.—It appears from the abstract that the cause was tried in the court below by an examination of the witnesses in open court. It does not appear that any motion was made at any time for a trial upon written evidence, nor that any order was made for the testimony to be taken down in writing on the trial, and made part of the record. We have repeatedly held that in order to entitle an appellant to a trial anew in this court the provisions of section 2742 of the Code must be complied with. It seems that the cause was tried as law

1. PRACTICE in  
the supreme  
court: trial  
de novo.

## Darland v. Wade.

actions are, by embodying the evidence in a bill of exceptions. No errors have been assigned, and as the cause is not triable anew, there is nothing in the record which this court can examine. The statute is explicit. We are precluded from trying any errors excepting such as are duly presented by assignment. Code, §§ 2741, 3183, 3207.

All equitable actions, of whatever character, are triable *de novo* upon appeal to this court, provided the parties have complied with section 2742 of the Code. *Sherwood v. Sherwood*, 44 Iowa, 192. If tried in the court below in the same manner as law actions, upon appeal to this court we can only try the errors assigned. After the cause was fully submitted the appellant filed a certificate of the trial judge, made and dated April 26, 1878, to the effect that the abstract contained all the evidence adduced on the trial. Aside from the fact that this certificate was made after the cause was submitted, it cannot avail the appellant. It nowhere appears affirmatively, or by implication, that any motion or order was made as required by Code, § 2742. These points are insisted upon by counsel for appellee, and we are not at liberty to disregard them.

AFFIRMED.

## DARLAND V. WADE.

1. **PRACTICE: AFFIDAVITS OF JURORS.** Affidavits of jurors may be received for the purpose of showing that the amount of the verdict was reached by dividing the sum of the amounts suggested by all the jurors by twelve.
2. ———: **REMITTITUR.** Where a quotient verdict was rendered it was *held* that the court was not authorized to accept a *remittitur* of all but the lowest amount which any juror was disposed to give, and render judgment for that amount.

*Appeal from Floyd Circuit Court.*

SATURDAY, JUNE 8.

ACTION for *crim. con.* Verdict and judgment for plaintiff.

48	547
103	608
48	547
138	562



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Darland v. Wade.

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Both parties appeal. The facts of the case appear in the opinion.

*Starr, Patterson & Harrison*, for plaintiff.

*J. Evans Owens*, for defendant.

BECK, J.—I. Upon the rendition of a verdict for two thousand three hundred dollars, defendant filed his motion to set it aside on the ground of misconduct of the jury in settling the amount under an agreement before entered into, to add together the amounts each juror should write upon a ballot, and divide the sum thus obtained by twelve. Affidavits of seven or eight of the jurors, in support of the motion, were filed, and the court found thereon the facts as alleged in the motion, and that the jurors had agreed in advance to settle their verdict in the manner indicated. The jurors, or some of them, filed other affidavits, contradicting to some extent their first statement, which, to our minds, greatly impair the credit to be given them. But the Circuit Court had more complete information of the facts involved, of the character of the jurors, and the influence, if any, used to procure the conflicting statements, than we have, and was better able to decide according to the very right of the matter than we are. The record before us so far supports the conclusion reached by the Circuit Court that we are not justified in disturbing it.

II. But counsel for plaintiff contend that a verdict cannot be assailed in this manner and set aside for irregularities of the character disclosed, upon the affidavits of jurors. But such practice must be considered settled by decisions of this court. See *Wright v. Ill. & Miss. Telegraph Co.*, 20 Iowa, 195, which has been frequently followed and approved.

III. The Circuit Court, having adjudged that the verdict was found in the manner above pointed out, held that a new

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Darland v. Wade.

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2 \_\_\_\_; \_\_\_\_; trial would be granted unless plaintiff should  
remittitur. enter a *remittitur* of the amount of the verdict  
above one hundred dollars, the sum which, it was shown, one  
juror wrote upon his ballot, all the other jurors writing on  
theirs two thousand five hundred dollars. The *remittitur*  
being entered, judgment was rendered for the sum of one  
hundred dollars. Plaintiff excepted to the decision upon the  
motion for a new trial, and defendant excepted to the order  
and permission to plaintiff to file a *remittitur*, and to the  
judgment. The plaintiff and defendant both assigned as  
error the order for the *remittitur*.

We know of no authority the court possessed to direct the  
*remittitur*, and to render judgment after it was entered. If  
the verdict was bad for the amount found, it was good for no  
amount. It cannot be claimed a verdict in the sum of one  
hundred dollars was returned by the jury. It is not the  
case of excessive damages which would authorize the court to  
require the plaintiff to take judgment for the true amount  
found by the court upon the evidence. We conclude, there-  
fore, that the judgment of the court below ought to be

AFFIRMED ON PLAINTIFF'S APPEAL,  
REVERSED ON DEFENDANT'S APPEAL.

## BRIGGS V. DOWNING &amp; MATTHEWS ET AL.

1. **Surety: CONSIDERATION: PROMISSORY NOTE.** To bind a surety upon a promissory note, who signed the same subsequent to the execution thereof by the principal and acceptance by the payee, and at the request both of payee and principal, some new consideration must be established, either of advantage to the signers of the note, or of prejudice to the payee.

*Appeal from Washington Circuit Court.*

SATURDAY, JUNE 8.

THE plaintiff claims of the defendants the sum of two hundred and sixty-one dollars and sixty-six cents, alleged to be due on two promissory notes executed by the defendants.

The defendant J. R. Phillips filed her separate answer, as follows: "Admits that on or about the time alleged by plaintiff defendants made to plaintiff the notes in suit; admits every other material allegation. But to have and maintain said action, plaintiff ought not, for that this defendant signed said notes at the request of plaintiff, and without any consideration whatever for so doing, and after the notes had been executed by the other defendants, Downing & Matthews." Afterwards, the defendant J. R. Phillips filed an amendment to her answer, as follows: "That after the notes in suit had been fully executed by the defendants Downing & Matthews to the plaintiff, and had been delivered to and accepted by plaintiff, with only said Downing & Matthews as makers, the same were, at the instance and request of plaintiff and the defendants Downing & Matthews presented to said J. R. Phillips, and her signature thereto requested and obtained; that said signing on the part of said Phillips was not in pursuance of any previous understanding or arrangement on her part nor on the part of plaintiff, nor on the part of either of the parties to said notes, and that she signed the

## Briggs v. Downing &amp; Matthews.

notes long after their execution, and without any consideration for so doing; that she had no interest whatever in the firm business of Downing & Matthews, nor in the consideration for which the notes were given, and asks judgment for costs." The plaintiff demurred to the answer, and the amendment thereto. The court sustained the demurrer. The defendant elected to stand on her answer, and judgment was rendered against her for two hundred and eighty dollars and forty cents.

The defendant J. R. Phillips appeals.

*Ed. W. Stone*, for appellant.

*Dewey & Beard*, for appellee.

DAY, J.—This case differs from *Dickerman v. Miner*, 48 Iowa, 508, and *Hamilton v. Hooper*, 46 Iowa, 515, in that the amendment to the answer in this case alleges that the defendant Phillips signed the notes at the instance and request of the other makers, Downing & Matthews. In the cases above referred to, the sureties signed the notes without the consent or knowledge of the principal, and it was held that the effect of such signing was to discharge the principal and bind the surety as the maker of a new note. The answer in this case alleges that the defendant Phillips signed the notes after they had been executed by the principals, and delivered to and accepted by the plaintiff. The undertaking of defendant was, therefore, a collateral one. Credit had already been extended to the principals. There must, therefore, be some new consideration, either of advantage to the defendants or prejudice to the plaintiff, to support the promise of the defendant, Phillips. See *Harwood v. Kinsted*, 20 Ill., 367 (374); *Tenny v. Prince*, 4 Pick., 385; S. C., 7 Pick., 243; *Leonard v. Indenburg*, 8 Johns. R., 29 (37), and cases cited; *Clark v. Small*, 6 Yerger, 418. The undertaking of the defendant being in writing imports a consideration. Still, it is competent for the defend-

1. SURETY:  
consideration:  
promissory  
note.

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Cotter v. O'Connell.

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ant to aver and prove that there was no consideration. The answer alleges that there was no consideration for defendant's promise, and, if this allegation be proved, defendant should be discharged. The demurrer should have been overruled.

REVERSED.

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COTTER v. O'CONNELL.

1. Tender: JUDICIAL SALE. Where a party paid to the clerk a certain amount as a tender to be accepted, if at all, in full discharge of a judgment, with interest and costs, the acceptance of it by the attorney of the judgment creditor will bind the latter to account to the plaintiff for the proceeds of a sheriff's sale made to satisfy the judgment.

*Appeal from Clinton Circuit Court.*

SATURDAY, JUNE 8.

On the 14th day of April, 1874, William O'Connell recovered a judgment by default against Garrett Cotter for one hundred and sixty-one dollars and three cents, and twenty-one dollars and ninety-five cents costs, and fifty dollars attorney's fee, together with a foreclosure of mortgage, and an order for a special execution. The petition upon which this judgment was rendered did not pray a foreclosure of the mortgage. On the 2d day of June, 1874, the mortgaged property was sold to Henry Gerhard, for the sum of one hundred and ninety dollars, and a certificate of purchase was issued to him. On the 2d day of the next term, September 8, 1874, Cotter appeared and moved the court to vacate the decree of foreclosure of the mortgage, and the proceedings thereunder, for the reason that the suit had been prosecuted at law, and no decree of foreclosure had been asked. On the 12th day of April, 1875, Cotter moved to set aside the sale to said Gerhard, and tendered and paid into court the sum of one hundred and eighty-two dollars and seventy-two cents, in full of

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Cotter v. O'Connell.

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the said judgment, interest and costs. Pending a decision upon said motion, Cotter filed his petition asking that the sale be set aside, and that the sheriff be enjoined from executing a deed to Gerhard. A preliminary injunction issued as prayed. O'Connell appeared and asked leave to amend his petition in the suit in which the foreclosure was obtained. At the September Term, 1875, the court rendered a decision upon the respective motions, refusing to permit O'Connell to amend his petition, setting aside the decree of foreclosure, and vacating the sale. From this ruling O'Connell appealed to this court. On the 20th day of September, 1876, this court reversed the ruling of the Circuit Court, and held that the sale was valid, and that the court should have permitted the amendment of the petition in the foreclosure proceeding. See *O'Connell v. Cotter*, 44 Iowa, 48. Pending this appeal, on the 17th day of April, 1876, John F. McGuire, attorney of O'Connell, accepted the money deposited with the clerk as a tender, and executed therefor a receipt, as follows: "Received from W. B. Leffingwell, clerk, the sum of one hundred and eighty-two dollars and seventy-two cents, the same being tendered by Isaac Baldwin on the 12th day of April, A. D. 1875, in the above case, for Garrett Cotter, and being tendered in full of principal and interest on note sued on, to April 12, 1875, in full payment of all costs prior to April 14, 1874." On the 28th day of September, 1876, a *procedendo* issued from this court, and on the 14th day of October, 1877, the sheriff executed to Gerhard a deed, pursuant to his purchase. In the meantime the action in which the injunction was prayed had been continued. On the 18th of January, 1877, Cotter filed a substituted and amended petition, setting forth a history of the cause, and praying that the sale to Gerhard be cancelled, and for general relief. The defendant answered, denying that the tender of one hundred and eighty-two dollars and seventy-two cents was received in full satisfaction of the amount due, alleging that one hundred and fifteen dollars and sixty-five cents had been applied in satis-

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Cotter v. O'Connell.

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rying costs in the Supreme Court and balance of the principal judgment, and tendering to plaintiff the balance, seventy dollars and ninety-seven cents. The court refused to set aside the sale to Gerhard, and rendered judgment against O'Connell for the amount for which the property was sold, with interest and costs. The defendant appeals.

*John I. Mullany*, for appellant.

*Isaac Baldwin*, for appellee.

DAY, J.—I. Appellant insists that plaintiff has mistaken his remedy. It is urged that he should have set up the fact of the acceptance of the tender under the provisions of sections 3212, 3213 of the Code, and moved thereon for a dismissal of the appeal in the Supreme Court. We are, however, of the opinion that, while the plaintiff might have pursued that course, he is not confined to that remedy.

II. Appellant mainly relies upon the fact that the tender was accepted, not in satisfaction of the entire demand, but merely in discharge of what remained after crediting the judgment with the amount of the sale. This position of appellant is not tenable. The amount accepted was very largely in excess of the unsatisfied portion of the judgment, and must have been known to the attorney of O'Connell to be so. It was within a few cents of the amount of the judgment, interest, and costs, less the attorney's fee. It was tendered and was in custody of the clerk in full satisfaction of the amount of the claim. The clerk had no authority to pay it out except in full satisfaction of the demand, and the evidence shows that he refused to do so. McGuire, the attorney of O'Connell, had no right to the tender except as in full discharge of the claim, and when he accepted it the claim was, in law, discharged. It is claimed that it is improbable that McGuire, as attorney for O'Connell, would accept one hundred and eighty-two dollars and seventy-two cents in full settlement of the case, when he had

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Waters v. Waters.

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already made one hundred and ninety dollars on the judgment through the sheriff's sale. But that sale had been set aside, and, to say the least, the validity of it was in great doubt. The defendant, having accepted satisfaction of the claim, was properly held to account for the proceeds of the sheriff's sale.

AFFIRMED.

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WATERS ET AL V. WATERS.

1. **Tenant in Common: RENTS AND PROFITS: HEIR AT LAW.** Facts considered under which it was held that plaintiffs were entitled to recover rents and profits from the defendant for the use and enjoyment of certain realty, which he held in common with plaintiffs' ancestor.

*Appeal from Winneshiek District Court.*

SATURDAY, JUNE 8.

PLAINTIFFS aver that they are the heirs at law of J. B. Waters, deceased, who departed this life in the month of August, 1865; that the defendant, H. P. Waters, and said J. B. Waters, were each the owners of an undivided half of certain real estate, and that upon the death of said J. B. Waters the plaintiffs became the owner of his interest by inheritance; that the defendant has received the rents and profits of said real estate. It is prayed that an account be taken of such of said rents and profits as have accrued since August, 1865, and that plaintiffs have judgment for their share thereof. The answer admits that the said real estate is owned in common by the plaintiffs and defendant. It is further averred that the said real estate was conveyed by Gardiner Waters to the defendant and said J. B. Waters in January, 1863, and that the consideration of said conveyance was that the grantee should pay off all the debts of said Gardiner Waters, and support and maintain him and his wife during their natural



*Waters v. Waters.*

lives; that defendant took and kept them during their lives, and paid the said debts and taxes on the land, and said John B. Waters, deceased, did not contribute his share to the maintenance of Gardiner Waters and his wife, and did not pay his share of said indebtedness, taxes, etc.

An account of several items of claim was set out in the answer, but it does not appear in the abstract. It is prayed that an account of said several matters be taken, and that "the balance in favor of either party be a lien upon the land described in the petition."

To this answer there was a reply in general denial.

There was a trial by the court. Judgment was rendered for the plaintiffs for six hundred and seventy-nine dollars. The defendant appeals.

*M. P. Hathaway*, for appellant.

*Willett & Wellington*, for appellees.

ROTHROCK, CH. J.—The defendant was examined as a witness in his own behalf. His wife was also examined as a witness. The plaintiffs objected to their testimony as incompetent, because the facts detailed by them were in the nature of personal transactions and communications had with John B. Waters, deceased. It does not appear that any ruling was made by the court upon this objection, excepting that appellants assign as error that the court disregarded the testimony of said witnesses. Under these circumstances it is proper that such of their testimony as was in the nature of personal transactions and communications with the deceased, should be excluded. The cause is triable *de novo* in this court, and after rejecting this incompetent testimony there is little left to support the defendant's cross-claim. It appears generally, from some letters written by the deceased, that he acknowledged an indebtedness to the defendant, but in what amount does not appear, except from the testimony of the defendant and his wife. We can-

1. TENANT in  
common;  
parents and prof-  
its: heir at law.

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 Officer & Pusey v. Evans.
 

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not ascertain from the abstract whether any of the claims accrued after the decease of John B. Waters.

About the only evidence which is definite and certain is the amount of rents received by defendant from the real estate, and certain items which were expended by him for repairs. It is not even shown what amounts he has paid in taxes since the death of John B. Waters.

It is not necessary for this court to determine whether the claims made by defendant, which accrued in the life-time of the deceased, are properly chargeable upon the land, because we think there is no competent evidence to establish said claims.

Taking the evidence that is definite and certain, the conclusion we reach is that the court below did not err in its finding as to the amount due.

**AFFIRMED.**

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**OFFICER & PUSEY V. EVANS ET AL.**

1. **Evidence:** BURDEN OF PROOF: CONTRACT. The burden of proof is upon the plaintiff to establish a parol contract under which he seeks to recover.
2. **Homestead:** EXISTING CREDITORS: HUSBAND AND WIFE A conveyance to the wife of real estate received in exchange for the homestead is not fraudulent as against existing creditors.

*Appeal from Pottawattamie District Court.*

**SATURDAY, JUNE 8.**

THE petition of plaintiffs alleges that they loaned to defendant S. S. Evans, in 1869, the sum of two thousand eight hundred and fifty-five dollars, for the purpose of enabling him to make alterations and improvements upon his house in Glendale, in Council Bluffs, for which amount he executed to them his note February 25, 1870; that at the time said loan

48	597
81	519
48	557
97	639
48	557
108	698
48	557
118	728

was made Evans told them that after said improvements were made he would thereby be able to effect an exchange of the said property with S. S. Bayliss for his homestead on the public square, and a livery barn in Council Bluffs, and that he would then give them security on the livery barn for their said loan to him, which loan was made by them on the faith of said promise, and to enable Evans to make the improvements and to effect the exchange. The petition further charges that said exchange of property was made about the 26th of October, 1869; that Evans, instead of taking the title in his own name and fulfilling his promise to them by giving them said security, caused the property to be conveyed by Bayliss to his wife, the defendant E. B. Evans; that said conveyance of the livery barn to E. B. Evans was made with the intent to defraud plaintiffs, and that she holds the title to said property in trust for the creditors of S. S. Evans. The petition further alleges that on the 21st of May, 1874, plaintiffs recovered a judgment against said S. S. Evans, on said note, for the sum of four thousand and sixty-nine dollars and forty cents. The plaintiffs pray that their judgment be declared a lien upon and enforced against said property, including the rents and profits thereof.

The defendant E. B. Evans denies that the contract alleged in plaintiffs' petition was made, and that she had any notice thereof, or that plaintiffs furnished S. S. Evans with money to make the alleged improvement. She admits the exchange of property with S. S. Bayliss. She alleges that prior to that time she had received by gift from her father, S. S. Bayliss, a tract of land in Nebraska of the value of two thousand dollars, and a half interest in the Parks mill property, valued at eight thousand dollars; that about 1868 she authorized her co-defendant, S. S. Evans, to sell said property and procure her other property in place thereof; that S. S. Evans sold the Nebraska property for two thousand dollars, and the Parks mill property for six thousand dollars, and under this arrangement kept the proceeds; that in

February, 1866, Evans and wife commenced housekeeping in their residence in Glendale, and continued to use it as a homestead until October, 1869; that the contract for the exchange was made and perfected in October, 1869, by S. S. Evans, E. B. Evans and S. S. Bayliss—S. S. Evans agreeing to convey the Glendale homestead to Bayliss, Bayliss agreeing to convey the residence on the public square, and the Pacific House livery stable, in consideration of their being conveyed to his daughter E. B. Evans, and the conveyance of the Glendale homestead to him—E. B. Evans agreeing to receive the residence on the public square and the livery stable, at a valuation of ten thousand dollars, in lieu of the property S. S. Evans sold, that she received of her father, and in consideration of her signing away her homestead and dower right in the Glendale homestead. The defendant E. B. Evans further alleges that plaintiffs' claimed contract is void, as being within the statute of frauds, and she pleads a former judgment as a bar to the action, and the plaintiffs' action is barred by the statute of limitations. The court decreed that the petition of plaintiffs be dismissed, and rendered judgment against them for costs. The plaintiffs appeal.

*N. M. Pusey and Rising, Wright & Mayne, for appellants.*

*James, Aylesworth & Mynster and Montgomery & Scott, for appellees.*

DAY, J.—I. The burden of proof is upon the plaintiffs to establish, by a preponderance of evidence, the contract set forth in the petition. From a careful examination of the entire evidence we cannot affirmatively find that the existence of the contract is so established. The most that can be said for the testimony upon that is, that it is *in equilibrio*.

II. The evidence shows very satisfactorily that the defendant E. B. Evans, prior to her marriage with her co-defendant,

1. EVIDENCE:  
burden of  
proof: con-  
tract.

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Officer & Pusey v. Evans.

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2. **HOMESTEAD:** was the owner of three hundred and twenty acres of land in Nebraska, of the value of two thousand dollars. After her marriage, in the spring of 1867, she received by gift from her father half of the Parks mill property, valued at eight thousand dollars. Her husband sold the Nebraska land in 1867 for two thousand dollars, and the Parks mill property in 1868 for six thousand dollars, and received the proceeds in cash, with the understanding that he was to convey to E. B. Evans, in lieu thereof, property of the value of ten thousand dollars. The defendants commenced occupying the Glendale property, as their homestead, in February, 1866. In 1869 the Glendale property was conveyed to S. S. Bayliss for his homestead and the brick barn in question. Bayliss and his wife refused to make the deed for this property unless it was made in favor of E. B. Evans, in lieu of the property they had given her, and which was appropriated by her husband. The inducement which caused E. B. Evans to convey her homestead right in the Glendale property was the obtaining of a deed in her own name for the Bayliss homestead and barn.

Under the circumstances disclosed, we think the conveyance to E. B. Evans was not without consideration nor fraudulent. At the time that her husband appropriated the proceeds of her real estate under the circumstances disclosed, she became his creditor. As such she was entitled to repayment. A conveyance to her of real estate in satisfaction of this debt was not fraudulent as to other creditors. Besides, the Glendale homestead was not liable for plaintiffs' claim. The defendants might have made a voluntary conveyance of this homestead, and it would not have been fraudulent as to creditors. See *Delashmut v. Trau*, 44 Iowa, 618. No conveyance of the homestead would be of any validity without the concurrence of the defendant E. B. Evans. As she was under no obligation to convey, and could not be compelled to convey, she had a perfect right to fix the conditions upon which she

would consent to convey. The evidence shows that she consented to convey only upon condition that the property received for the homestead should be conveyed to her. She had a right to exact this condition, and, as the homestead was not liable for plaintiffs' debt, it seems to us the property which she received in lieu of the homestead, and which induced her to part with her homestead, should also be held exempt. The plaintiffs suffer no injury from such a construction of the law, for they are thereby placed in no worse condition than they occupied before. It is true if she had allowed the avails of the sale of this homestead to pass into the hands of and become the property of her husband, it would, if not reinvested in a new homestead, have become the property of her husband, and liable for his debts. But this she did not do.

It is claimed, however, that in the exchange with Bayliss S. S. Evans obtained the payment of a debt of three thousand dollars, which Bayliss owed him, and that to that extent, at least, the property in question should be regarded as the property of S. S. Evans, and liable for his debts. The only evidence of this act is proof of a declaration of S. S. Evans, which is not admissible as against the defendant E. B. Evans. Besides, the proof shows that the Glendale property was estimated at ten thousand dollars, and that the real estate conveyed in exchange for it was estimated at the same, so that it could not have, in fact, discharged a debt due S. S. Evans.

We are of opinion that the judgment should be

**AFFIRMED.**

## THE STATE V. SAVOYE.

48	562
86	221
48	562
95	384
48	562
123	525
123	526
48	562
1132	422
48	562
144	271

1. **Criminal Law : CONSPIRACY.** An indictment charging that the defendants did "conspire \* \* \* to cause \* \* \* S. to go with them \* \* \* with the view, purpose and intent, with the intention of bringing about a sham marriage or pretended marriage between her, the said S., and him, the said defendant, and thus bring about the seduction of her, the said S., in violation of law," was *held* to charge a conspiracy to commit a crime.
2. ——— : ——— : **SEDUCTION.** It is not necessary that such an indictment should in terms charge that the woman was unmarried and of previously chaste character.

*Appeal from Allamakee District Court.*

SATURDAY, JUNE 8.

THE following indictment was found and duly presented against the defendant:

"The jurors of the grand jury of the State of Iowa within and for said county of Allamakee, legally convoked, impaneled, tried, sworn and charged, in the name and by the authority of the State of Iowa, upon their oaths do aver, find and present that Charles Savoye and Conrad Arnold, at and within said county, on or about the 15th day of August, 1875, with force and arms unlawfully, wickedly, deceitfully, maliciously and injuriously, did conspire, combine, confederate and agree together, to cause, induce, persuade and procure one Mary Ellen Elizabeth Stielsmith, commonly known as Elizabeth or Lizzy Stielsmith, she the said Lizzy Stielsmith then and there being a minor under the age of twenty-one years, to-wit, nineteen years old, to go with them, the said Charles Savoye and Conrad Arnold, with the view, purpose and intent, with the intention, of bringing about a sham marriage or pretended marriage between her, the said Lizzy Stielsmith, and him, the said Charles Savoye, and thus bring

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The State v. Savoye.

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about the seduction of her, the said Lizy Stielsmith, in violation of law.

"And the jurors aforesaid, on their oaths and by the authority aforesaid, do further find and present that the said Charles Savoye and Conrad Arnold, in pursuance and furtherance of, and according to the said conspiracy and agreement between them, the said Charles Savoye and Conrad Arnold, as aforesaid, had, did, on or about the time and place aforesaid, wickedly, falsely, maliciously, unlawfully and injuriously entice, persuade, cause and procure her, the said Lizy Stielsmith, to go in the company and along with them, the said Charles Savoye and Conrad Arnold, with the view of causing her said sham or pretended marriage, and her said seduction with and by him, the said Charles Savoye as aforesaid; and in furtherance of and according to the said conspiracy, combination, confederacy and agreement, the said Charles Savoye and Conrad Arnold then and there did aid, assist and carry away the said Lizy Stielsmith in a certain buggy then and there procured by said Charles Savoye and Conrad Arnold therefor, to a certain woods or piece of timber known by the name of the "North Fork Timber," near by a place commonly known therein as the "Devil's Den," and while then and there as aforesaid, he, the said Conrad Arnold, wilfully and falsely assuming to be an officer who is and was lawfully authorized to perform the marriage ceremony and join in wedlock persons who wish to become married, to-wit: a justice of the peace of said county, who then and there, in furtherance of said unlawful conspiracy and agreement, performed a pretended marriage ceremony or service for her, the said Lizy Stielsmith, and him, the said Charles Savoye, and did then and there, in furtherance of such unlawful conspiracy and agreement, unlawfully pronounce her, the said Lizy Stielsmith, and him, the said Charles Savoye, lawful man and wife; that then and there she, the said Lizy Stielsmith, believing that she was such lawful wife, allowed him, the said Charles Savoye, to then and there



## The State v. Savoye.

have carnal connection of and with her, the said Lizy Stielsmith, to the great injury of her, the said Lizy Stielsmith, and to the evil example of others, and contrary to the forms of the statute in such cases made and provided."

The defendant demurred, because—*First*, it nowhere appears from said indictment that the defendants conspired or confederated together, with intent wrongfully to do any act in violation of the statutes of said State applicable to the crime charged, viz.: that of conspiracy; *second*, the indictment fails to state Mary Stielsmith was at the time an unmarried woman; and, *third*, the indictment shows that a marriage was duly and legally performed, and, therefore, there could have been no seduction.

This demurrer and a motion in arrest of judgment, on substantially the same grounds, were both overruled, and the defendant appeals.

*L. O. Hatch and Dayton & Dayton, for appellant.*

*J. F. McJunkin, Attorney General, for the State.*

SEEVERS, J.—I. It is insisted "that it must appear on the face of an indictment for conspiracy that the object of the conspiracy was a criminal one, or that the means to be employed therein were criminal." *State v. Jones*, 13 Iowa, 269.

The indictment charges that the defendants "did conspire \* \* \* to cause \* \* \* Mary Ellen Elizabeth Stielsmith to go with them \* \* \* with the view, purpose and intent with the intention of bringing about a sham marriage or pretended marriage between her, the said Stielsmith, and him, the said Charles Savoye, and thus bring about the seduction of her, the said Stielsmith, in violation of law." Now, conceding there are two counts in the indictment, does the foregoing charge a conspiracy with intent to commit a crime? We think it does charge an intent to accomplish the seduction of the said Stielsmith. That was the object and

I. CRIMINAL  
law: conspir-  
acy.

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The State v. Savoye.

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intent of the conspiracy—the end to be accomplished. It is also charged they conspired as to the means to be used, and “thus bring about the seduction of her, the said Stielsmith.” It is not a fair construction of the language used to say there was only a conspiracy as to the means to be used, or that it was only to “induce (the woman) to go with the said Charles Savoye and Conrad Arnold,” for the object and intent was the seduction of this woman, and seduction of an unmarried female of previously chaste character is a crime. Code, § 3867.

II. Is it necessary that the indictment should charge the  
 2. —; —: woman was unmarried and of previously chaste  
 seduction. character?

The crime of seduction under our statute is a felony. Code, §§ 3867, 4104. And the statute further provides, “if two or more persons conspire \* \* \* to commit any felony,” they shall be punished, etc. Code, § 4087.

Where the conspiracy is to do a criminal act it is sufficient “if it be described by the proper name or terms by which it is generally known in the law.” *State v. Potter*, 28 Iowa, 554, and authorities there cited.

“The gist of the offense of conspiracy is the unlawful combination and agreement. It is not necessary, to constitute the offense, that any overt act should be done in pursuance of such combination and agreement, nor that such overt acts should be alleged.” *Alderman v. The People*, 4 Mich., 414. An indictment which charged a burglary or breaking with intent to commit larceny, murder, arson, rape or seduction, without charging the facts necessary to constitute either of said causes, it is believed would be sufficient. To sustain a conviction under such an indictment the alleged intent must have been established, and so, in the case at bar, the object and intent of the conspiracy must be established by the evidence.

III. It is insisted that the facts alleged show there was a marriage binding on both these parties, and, therefore, the

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The State v. Arnold.

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crime of seduction was not committed. As we have seen, it is immaterial whether the object intended be accomplished or not. The crime is complete when the conspiracy is formed, and if this was a "sham and pretended" marriage, the means adopted were unlawful. But, be this as it may, we are unable to say this was a legal, valid, and binding marriage, from the statements in the indictment, and we have nothing else before us.

AFFIRMED.

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48	566
79	672

48	566
121	403

THE STATE v. ARNOLD.

1. **Criminal Law: EVIDENCE: ADMISSION OF CO-CONSPIRATOR.** The admission of a conspirator after the conspiracy is at end, even upon a plea of guilty, is evidence only as against himself, and is not admissible against his alleged co-conspirators.

*Appeal from Allamacke District Court.*

SATURDAY, JUNE 8.

THE defendant and one Charles Savoye were jointly indicted for conspiring together to bring about the seduction of Elizabeth Stielsmith. The indictment is fully set out in the case of *The State v. Savoye*, ante, 562. The defendant was convicted and sentenced to the penitentiary for three years. He appeals.

*L. O. Hatch, and Dayton & Dayton, for appellant.*

*J. F. McJunkin, Attorney General, for the State.*

DAY, J.—I. The defendant's demurrer to the indictment was overruled. The indictment was held sufficient in the case of *The State v. Charles Savoye*, before alluded to.

II. Upon the trial the State was permitted to prove the statements of Charles Savoye, containing a detailed and circumstantial admission of the facts constituting the offense.

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The State v. Coenan.

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These declarations were made long after the alleged offense was committed. The admission of this evidence was error. "When the common enterprise is at an end, whether by accomplishment or abandonment, no one of the conspirators is permitted by any subsequent act or declaration of his own to affect the others. His confession, therefore, subsequently made, even though by the plea of guilty, is not admissible in evidence, as such, against any but himself. Under no circumstances can the most solemn admission made by him on trial be evidence against his accomplices." Wharton's Criminal Law, § 703, and cases cited.

REVERSED.

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THE STATE v. COENAN.

1. **Criminal Law : GIVING INTOXICATING LIQUORS TO MINORS.** A party cannot justify the act of giving intoxicating liquors to a minor by establishing that he did it by the order of the parent, unless he shows that the order was in writing.

*Appeal from Linn Circuit Court.*

SATURDAY, JUNE 8.

THE petition shows that the defendant sold or gave away beer to one Albert Cooper, a minor. The defendant, in his answer, admits that he gave beer to the said Albert Cooper, but says that he did so by the order of his father, John Cooper, upon whose relation this action is instituted. The plaintiff demurred to the defendant's answer upon the ground that it did not show that the defendant gave the beer upon the written order of the said John Cooper. The court sustained the demurrer. Defendant appeals.

*Thompson & Davis*, for appellant.

*J. B. Young*, for appellee.

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 Janes v. Brown.
 

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ADAMS, J.—Section 1539 of the Code provides that “it shall be unlawful for any person to sell or give away, by agent, or otherwise, any spirituous or intoxicating liquor, including wine and beer, to any minor, for any purpose whatsoever, unless upon the written order of his parent, guardian or family physician.” It is contended by the defendant that if it be shown that the parent’s consent was obtained it is immaterial whether it was obtained in writing or not. To this it is sufficient to say that it is not for us to override an express provision of the statute, because, in our judgment, the provision is unnecessary. Besides, the provision in question seems to us to be a wise one. It is calculated to insure deliberation on the part of the parent, guardian or physician, and, in addition, it is calculated to secure such evidence of the fact of consent as will prevent litigation upon the question as to whether the consent was given. We think that the demurrer was rightly sustained.

1. CRIMINAL  
law: giving  
intoxicating  
liquors to  
minors.

**AFFIRMED.**

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**JANES V. BROWN ET AL.**

1. **Res Adjudicata: PARTITION: LIEN OF HEIR.** The partition of the lands of an ancestor among his heirs, in a proper proceeding therefor, is an adjudication of all rights in or claims to a lien of all of the heirs for any purpose upon the lands so partitioned.
2. **Administrator: CLAIM OF.** An administrator of an estate of which he was one of the heirs cannot, after the personal estate has been distributed, and after the time has elapsed in which all claims against the estate should have been filed, maintain an action against his co-heirs for services rendered the ancestor.

*Appeal from Hardin Circuit Court.*

SATURDAY, JUNE 8.

ACTION in chancery. A cross-bill was filed by defendants.

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Janes v. Brown.

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Upon a trial on the merits both bill and cross-bill were dismissed, and both plaintiff and defendants appeal.

*Porter & Moir*, for plaintiff.

*Huff & Reed*, for defendants.

BECK, J.—I. The petition alleges that plaintiff and defendants are children and heirs at law of Sylvanus M. and Eunice Janes, deceased; that plaintiff, for more than nine years after he attained his majority, lived with his parents and supported them by his labor upon their farm, under an agreement that he was to be paid therefor in land, and subsequently it was agreed that plaintiff was to have the farm upon which the family lived; that, in pursuance of this agreement, he rendered service to his parents which, with interest, amounted to three thousand two hundred and fifty-nine dollars, and that defendants, after the death of their parents, instituted proceedings in partition, wherein the shares of the heirs in the land were set apart to each, plaintiff being allowed one-third thereof. The relief claimed is, that judgment be rendered in favor of plaintiff for the amount of his claim, which shall be declared a lien upon the land set apart to the defendants.

The answer of defendants denies the allegations of the petition, and puts in issue plaintiff's services, the contract alleged under which they were rendered, and alleges that plaintiff lived with the parents as one of their family, and never had any claim against them for compensation for his labor.

It is also shown that in this partition suit plaintiff set up a claim for the land based upon the contract and services set out in his petition, which was adjudged against him in the final decision of the case, and that plaintiff took out letters of administration upon the estate of his father, and took no steps to make the claim a charge against the estate, although there were personal assets in his hands as administrator.

In their cross-bill defendants claimed to recover for the rent of the land accruing prior to the partition, and subsequent

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Janes v. Brown.

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to the death of the parents. The plaintiff, in his replication to the answer and cross-bill, admits the administration upon the estate as alleged by defendants, and that he made no claim against it, and shows that his occupancy of the land, for which he is sought to be charged in the cross-bill, was as a tenant in common with defendants.

II. We find that the allegations of the pleadings in regard to the partition of the lands are supported by the testimony, and that plaintiff did set up a lien and right thereto based upon the same matters which are the foundation of his claim against defendants in this suit. So far as this action can be regarded as setting up a claim to the land in the nature of a lien, or a right adverse to the defendants, it presents matters that have been adjudicated. They cannot be again brought up for determination.

III. If this action is to be regarded as a proceeding to recover a money demand on account of the services rendered by plaintiff, other questions must be considered. In this view it is an action by one who is or was the administrator of an estate, against the heirs of the decedent, to recover for a claim against the estate, which he neglected or refused to present in the probate proceedings, and the time limiting the presentation and allowance of claims against the estate has expired. Upon this state of facts can he recover in this action?

Whether an action may be brought in this State against an heir for the debt of his ancestor is a question not argued in this case. We will not pass upon it. See Bingham on Descents, § 9, p. 271, as to the right to prosecute such an action.

But, whatever be the law of this State upon this subject, we think plaintiff is not entitled to prosecute this action. As administrator of the estate of his deceased parent, he held assets which could have been appropriated to the payment of his claim had it been duly allowed. He failed to take any steps for its allowance, or to set it up in any manner as a

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Frazier & Cooper v. The K. C., St. J. & C. B. Ry Co.

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claim, and permitted it to be barred by the statute prescribing the period within which claims shall be presented against estates. The personal assets were distributed. He fails to give a sufficient reason for not presenting his claim against the estate. Under these circumstances, he must be presumed to have abandoned his claim; equity will not now enforce it.

IV. The defendants insist that they are entitled to a judgment upon their cross-bill for the rents of the land. During the time for which they claim rent the parties were tenants in common; defendants, therefore, cannot recover, having failed to show an agreement under which they are entitled to rent, a demand for the possession of the land, or the receipt of rent by plaintiff from another. *Reynolds v. Wilmeth*, 45 Iowa, 693.

We conclude that the decree of the Circuit Court ought to be

**AFFIRMED.**

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**FRAZIER & COOPER v. THE K. C., ST. J. & C. B. RY. CO.**

1. **Railroads: SHIPMENT OF STOCK: DELAY IN.** Where the stock to be shipped by plaintiff was not loaded upon the arrival of the defendant's train, and was not even in the yards of the company, but in a private yard, and had not been given into the possession of any authorized agent of defendant, it was *held* that defendant was not liable for refusing to delay the train until the stock could be loaded, notwithstanding the same train took cars of stock at other stations later, although in these instances the locomotive was required to assist in loading the cars, while in plaintiff's case it was not.

*Appeal from Pottawattamie Circuit Court.*

SATURDAY, JUNE 8.

THE plaintiffs claim of defendant the sum of ninety dollars and ninety cents, for an alleged failure of defendant to take and ship for plaintiffs four car loads of hogs. The cause was tried by a jury. Both parties asked for special findings.



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Frazier & Cooper v. The K. C., St. J. & C. B. R'y Co.

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The plaintiffs moved for judgment on the special findings. The court overruled the motion, and rendered judgment for defendant for costs. The plaintiffs appeal.

*Stow & Hammond*, for appellants.

*Sapp & Lyman*, for appellee.

DAY, J.—At the instance of plaintiffs the jury returned the following special findings :

Was not there one car of the plaintiffs' stock loaded, and the remainder in the yards of defendant ready for loading, before defendant's train left the station? Ans.—Yes.

Did the train wait at all on account of plaintiffs' stock at Watson? Ans.—No.

Were the stock yards of the defendant in a suitable condition in which to keep plaintiffs' stock? Ans.—No.

Were the yards suitably supplied with water? Ans.—No.

Did not the same train stop and load stock at the next station? Ans.—Yes.

How many loads of hogs did the same train stop and load at the next station? Ans.—Five or six.

At the next station, Phelps, did not the same train stop and load several cars of hogs, some of which were brought in on wagons and weighed after the train arrived? Ans.—Yes.

What was the reason that the hogs of plaintiffs were put in the private yard at Watson? Ans.—Defendant's yards not suitable.

Did not the plaintiffs, after loading several cars at Hamburg, come to Watson on the same train and proceed without any unnecessary delay to load the hogs in question? Ans.—Yes.

Did not the agent at Watson and conductor tell plaintiffs to load, and did they not then proceed to get the hogs into the yard and did load one car? Ans.—Yes.

Did not the station agent at Watson tell the plaintiff Cooper, but a few days previous, he need not load two cars he then had there until after the train arrived? Ans.—Yes.

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Frazier & Cooper v. The K. C., St. J. & C. B. R'y Co.

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How much did plaintiffs lose by shrinkage on account of delay in the shipment? Ans.—Five hundred pounds at \$6.65 —\$33.25.

How much did they lose by decline in market? Ans.—Ten cents per hundred pounds on fifty-five thousand four hundred pounds—\$55.40.

How much did they lose in extra feed? Ans.—\$3.50.

How much did they lose in time and expenses? Ans.—\$10.00.

Was the conduct of the K. C., St. J. & C. B. R. Co., in the matter of receiving and shipping plaintiffs' stock at Watson, the usual or customary course pursued by railroad companies in the shipping of stock? Ans.—It was unusual conduct in the K. C., St. J. & C. B. R. Co. to leave those loaded with stock, but not unusual so far as the balance of the hogs in the yard were concerned.

Was not the order, when made for the cars at Watson, for four cars to ship hogs south on the next day? Ans.—Yes.

Would the train of defendant have been detained longer in taking the four car loads of hogs, in the condition the train left them at Watson, than they were in taking and loading an equal number at Phelps? Ans.—No.

At the instance of the defendant the jury returned the following special findings:

Were the hogs in controversy in the yards, or on the depot grounds of the defendant at Watson, at any time before the south-bound freight train arrived at that station on the 14th day of December, 1875? Ans.—No.

Were the hogs in controversy in the yards, or on the depot grounds of the defendant at Watson, when said freight train arrived at that station on the said 14th day of December? Ans.—No.

Were they not up to that time in a private yard in no way controlled or used by defendant? Ans.—Yes.

Was there any person at Watson authorized in any manner to act for Frazier & Cooper, at any time after five o'clock

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Frazier & Cooper v. The K. C., St. J. & C. B. R'y Co.

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p. m. of December 13, 1875, and before the arrival of said train on the 14th? Ans.—No.

Were the hogs in controversy given into the control of any authorized agent of defendant at any time previous to the arrival of said train at Watson on December 14th? Ans.—No.

When were the cars placed at the Watson station by defendant, in which to ship said hogs? Ans.—Sometime during the night of the 13th.

Had the plaintiffs notified the station agent at Watson, at that time, to what particular station the hogs were to be shipped? Ans.—No particular station, but south to St. Joseph or Kansas City.

Had the plaintiffs notified the station agent at Watson to what particular station said hogs were to be shipped at the time the freight train aforesaid arrived there on the 14th day of December? Ans.—No.

Had they so notified him at the time the said freight train received orders not to wait for these hogs? Ans.—No evidence that they stated at any time to what particular station they were to go, only south.

Were there any of the hogs in controversy in the company's yards or on their depot grounds at Watson until after the freight train had received such orders? Ans.—Yes.

About what time, on the 14th day of December, did the said freight train arrive at Watson? Ans.—Between one and two o'clock.

Did the plaintiffs notify any authorized agent of the defendant that any of the hogs at Watson were loaded into the cars until after the train had received orders to go on? Ans.—No.

Whose duty is it to load the stock into the cars after they are placed in proper position—the station agent, or the shippers, which? Ans.—It is the duty of both shippers and employes of the railroad company.

Is it not necessary, under the customs and rules for ship-

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Frazier & Cooper v. The K. C., St. J. & C. B. R'y Co.

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ping stock, that, after the stock is loaded, a way-bill should be made, and also a contract of shipment signed before the car is ready to be put into a train? Ans.—Yes.

Has a conductor, under such rules and customs, a right to take a car into a train until this has been done? Ans.—No.

Has he a right to take a car into his train until he has been notified by the station agent that the car is ready for transportation? Ans.—No.

Had the plaintiffs furnished the station agent at Watson the necessary data from which he could make up the way-bills and contract, up to the time the said train was ordered to go on? Ans.—No.

Had they done so up to the time the train left Watson? Ans.—No.

Were the cars placed at the yards of the defendant, in a suitable position for being loaded, on the night of the 13th of December? Ans.—Yes.

Could these cars have been loaded without the aid of a locomotive? Ans.—Yes.

Is it not the custom, at stations where it can be done, to load stock cars without the aid of a locomotive? Ans.—It is customary to load with or without the aid of an engine.

Is it not the custom, when the loading can be done without the aid of a locomotive, to have the cars loaded by the time of the arrival of the train which is to transport them? Ans.—It is usually customary to do so.

Is it not the custom, at stations where a locomotive is necessary for loading, to load all that can be loaded without its use, before the arrival of the train which is to take the cars. Ans.—It is usually customary to do so.

Is it not the custom, at stations where a locomotive is necessary for loading, to load the cars remaining unloaded after the arrival of the train? Ans.—Yes.

Had the hogs in controversy been given into the control of any authorized agent of defendant at any time previous to the time the said freight train of December 14th received orders to

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Frazier & Cooper v. The K. C., St. J. & C. B. R'y Co.

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leave the Watson station, and if so to whose control? Ans.—No.

Did the station agent at Watson notify the conductor of the freight train, on the 14th day of December, that the cars in controversy, or any of them, were ready for transportation? Ans.—No.

Were the cars, or any of them, containing the hogs of plaintiffs, loaded, the hogs counted, the way-bills made out, and the shipper's contract signed, before said freight train left the Watson station? Ans.—One car loaded, but not counted; no way-bill made out or contract signed.

Were not the stock yards of defendant in suitable condition from which to load hogs? Ans.—Yes.

Did not Cooper, one of the plaintiffs, leave the hogs in said yard twenty-four hours previous to their being shipped on December 16th? Ans.—No evidence to that effect.

Were not the cars at Phelps loaded when the train arrived there, so far as it could be done, without the aid of a locomotive? Ans.—They were loading.

Was it not necessary to use the locomotive at Phelps to load the balance of the cars? Ans.—Yes.

Was there any delay at Phelps because the hogs were not in the yards of the company? Ans.—No.

Does not the train dispatcher have control of the movements of the train? Ans.—Yes.

We have set out in full the special findings of the jury, because upon them the court acted in rendering judgment for the defendant. We are fully satisfied that the action of the court was right.

From these special findings it appears that the plaintiffs came to Watson on the same train on which they expected to ship their hogs. The hogs to be shipped were not in the yards or on the depot grounds of the defendant when the train arrived at Watson, but were in a private yard in no way controlled or used by defendant. They had not been given into the control of any

1. RAILROADS:  
shipment of  
stock; delay  
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Frazier & Cooper v. The K. C., St. J. & C. B. R'y Co.

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authorized agent of defendant. Defendant had not been notified to what particular station the hogs were to be shipped. Cars were placed at the yards of defendant, the night previous, in a suitable condition to be loaded, and they could have been loaded without the aid of a locomotive. Under such circumstances the plaintiffs had no right to demand or expect that the defendant's train should delay at the station until the hogs should be driven into the defendant's stock yards, loaded, way-bills made out, contract of shipment signed, and the cars placed in the train. If such delay could be demanded at one station, it could be demanded at every station on defendant's road. Both humanity and interest require that stock trains shall go forward with all reasonable dispatch. The plaintiffs should have left some one at Watson in charge of their hogs, and had them loaded and ready for shipment when the train arrived. Each train must be moved with reference to all the other trains on the road. A delay of a few minutes at one station might occasion a corresponding delay of every train on the line of road, and even result in accidents, destructive of property and life. No person desiring to become a passenger upon a train could rightfully demand a delay of one minute to enable him to reach the train and get on board. Upon what principle, then, can these plaintiffs demand damages because the defendant's train did not wait until they could drive their hogs into defendant's yard, load four cars, count them, have way-bill made out, shipping contract signed, and the cars placed in the train? But plaintiffs say the yards of defendant were not in suitable condition, and hence they were not required to have their hogs in defendant's yards. The special findings show the yards of defendant were not in suitable condition for keeping plaintiffs' stock, not being supplied with water. The special findings further show that the yards of defendant were in a suitable condition from which to load hogs. There is nothing shown to excuse plaintiffs from driving their hogs to defendant's yards, and having them loaded in time for the train.

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The State v. Lewis.

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It is further said that the agents of defendant a few days previously told Cooper he need not load two cars he then had there until after the train arrived. This particular transaction would not estop defendants from insisting upon a compliance with the usual custom as to future shipments of a greater number of car loads. It is further said that the train stopped at the next station, Phelps, and loaded several cars of hogs, some of which were brought in in wagons and weighed after the train arrived. The special findings show that there was no delay at Phelps because the hogs were not in the yard of the company, and that the cars at Phelps were loaded when the train arrived, so far as could be done without the use of a locomotive. The very fact that the train had to stop and use its locomotive to load at Phelps is a reason why it ought not to be delayed at Watson, where the loading could be done without the use of a locomotive. It is said, however, that one car was loaded, and that plaintiffs should have damages because it was not taken in the train. But the hogs in this car were not counted, and no way-bill was made out, nor does it appear that plaintiffs desired or were willing that this car should go forward alone.

AFFIRMED.

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THE STATE V. LEWIS.

1. **Criminal Law: SEDUCTION: FORCE.** Where, upon the trial of one indicted for seduction, the prosecuting witness testified that the defendant overpowered her, the court should have instructed the jury that, if the defendant accomplished his purpose by force, he was entitled to an acquittal.

*Appeal from Howard District Court.*

MONDAY, JUNE 10.

THE defendant was indicted, tried, convicted and sentenced

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The State v. Lewis.

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for the crime of seduction, and appeals to this court for a reversal of the judgment against him.

*H. T. Reed, for appellant.*

*J. F. McJunkin, Attorney General, for the State.*

ROTHROCK, CH. J.—I. The complaining witness testified that the defendant had sexual intercourse with her on two occasions—once on the night of the 7th of October, 1875, and again in two weeks after that time. She stated that on both occasions she resisted the defendant all she could and he overpowered her.

1. CRIMINAL  
law: seduc-  
tion: force.

The defendant asked the court to instruct the jury as follows: "If the intercourse was against the will of complainant, and accomplished by force, then the offense charged is not established and you must acquit." This instruction was refused. We think it should have been given. If the intercourse was accomplished by force, and against the will of the prosecutrix, the crime was rape, and not seduction. It is true the witness in other parts of her testimony stated that she let defendant have connection with her because he teased her, and she loved him, and they were engaged. But her last utterance while on the witness stand, upon this subject, was that she resisted all she could and was overpowered. When the witness made two statements as to the manner of the criminal connection so utterly at variance, it was the right of the defendant to have the jury instructed upon the effect of that statement which was favorable to him. We find nothing in the instructions given by the court which covers this point. It is true the jury were instructed as to the necessary evidence to constitute seduction, but, we think, as there was evidence which showed that the act was not seduction, but rape, the instruction asked should have been given.

II. It is claimed that the defendant was tried without having been arraigned and without pleading to the indictment,



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Steyer v. Curran.

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and that for these reasons a motion which was made in arrest of judgment should have been sustained.

We need not determine this question, because, before a re-trial in the court below, an arraignment may be had and a plea interposed. Other questions are made, including the insufficiency of the evidence corroborative of the prosecutrix, which we need not determine, because, upon a re-trial, there may not be the same subject of complaint.

REVERSED.

STEYER V. CURRAN ET AL.

1. **Practice in the Supreme Court:** EXCEPTIONS TO INSTRUCTIONS. When the defendant fails to except to the instructions of the court, relying upon a practice that all instructions given are regarded as excepted to, the practice should be stated in the abstract to be of avail to appellant.
2. **Evidence:** BOUNDARY LINE. In an action involving the determination of the division line between certain city lots where the plaintiff claimed under a conveyance which described the land conveyed by a fixed monument, the testimony of a surveyor who platted the land, as to the location of certain stakes set by him, was properly rejected.

*Appeal from Winneshiek District Court.*

MONDAY, JUNE 10.

ACTION to recover land. There was a verdict and judgment for plaintiff. Defendants appeal.

*L. Bullis*, for appellants.

*Brown & Wellington*, for appellee.

BECK, J.—I. The land in controversy is part of lots one and four, in block thirteen, in the town of Decorah, being two feet in width off of the west side of a strip twenty-two feet wide off of the east side of the west one-half of the lots named.

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Steyer v. Curran.

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The controversy involves the determination of the division line between the part of the lots described and the adjacent property. The court gave the following and no other instruction to the jury:

"In this case both parties claim the title through the deed executed by William and Elizabeth Day to William Kimball, introduced in evidence, and under the recitals in said deed the lines of plaintiff's and defendants' lots must be determined by measurements, starting from a point six feet west of the north-west corner of the Decorah House, mentioned in said deed, as the same was located at the date of the said deed, and it is undisputed in the evidence that the present location of such corner is the same as it was at the date of the deed, and if you find from the evidence that, by measuring from a point six feet west of such corner, the west line of plaintiff's lots includes the premises in dispute, you will find for the plaintiff."

The defendants insist that the instruction is erroneous. We are relieved from the necessity of entering into an examination of the case in order to determine the point thus made. No exceptions were taken to the instruction in the court below, either at the time it was given, or upon a motion for a new trial, as prescribed by Code, § 2789.

Counsel for appellants claims that it is a practice in the court below to regard all instructions given as excepted to, and for this reason insists that we should pass upon the instruction in question. A difficulty with this position is that the fact stated in regard to the practice does not appear in the record. We cannot base our decision upon the statements of counsel. The instruction must be regarded as the unquestioned law of the case.

II. An objection is based upon a ruling set out in the abstract in the following language: "Plaintiff offered in evidence pages 304 and 305 of book "A" of town lots. Defendant objected to the same as irrelevant, immaterial, incompetent, inadmissible, and not the best evidence. Overruled, and defendant excepted." Counsel informs us the pages offered

1. PRACTICE  
in supreme  
court: ex-  
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Steyer v. Curran.

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contained the record of a plat. He insists that it was secondary evidence. Let this be admitted. But secondary evidence is admissible under some circumstances. The record does not show such circumstances did not accompany the offer. We are to presume in favor of the correctness of the court's ruling.

III. Testimony was offered by defendants to show the place of a certain stake set by a surveyor who had laid off and  
2. EVIDENCE: platted the town. It was rejected upon plain-  
boundary line. tiff's objection. We think the ruling correct, as  
the location of the land in controversy is to be determined by measurement from a monument called for in the conveyances constituting plaintiff's title. If the stake did not correspond with this fixed monument it would have no effect in determining the measurement. The testimony was, therefore, immaterial.

IV. Other rulings upon the admission of testimony are made the grounds of complaint. We have with great care and patience endeavored to discover the points in controversy, but are utterly unable to master the abstract so as to arrive at a clear and satisfactory understanding of the points and facts involved therein. The abstract is wanting in clearness to an extent we have never before witnessed. Little aid in understanding it is to be derived from the arguments. Counsel doubtless understand the case, having learned its mysteries upon trial in the court below, and from a study of the record from which the abstract was prepared. They have forgotten that we have no such advantage, but must decide the case as it is presented in the abstract. It would be a waste of time and labor to attempt a discussion of other points than those above decided; all we could accomplish would be to demonstrate the want of intelligibility of the abstract.

## The State v. Northrup.

## THE STATE V. NORTHRUP ET AL.

1. **Criminal Law: EVIDENCE: GOOD CHARACTER.** A person accused of a crime is in all cases permitted to introduce evidence tending to establish his previous good character, and it is for the jury, without instructions from the court in reference thereto, to determine its weight as they would that of any other fact in evidence.
2. ———: **ALIBI: EVIDENCE.** It requires only a preponderance of evidence to establish the defense of *alibi*.

*Appeal from Mitchell District Court.*

MONDAY, JUNE 10.

INDICTMENT for larceny. The defendants, having been convicted, appeal.

*L. M. Ryce*, for appellants.

*J. F. McJunkin*, Attorney General, for the State.

SEEVERS, J.—I. The principal evidence against the defendants was that of an acknowledged accomplice, without which there could not have been a conviction. The defendants gave evidence tending to show they were persons of good character, and the court instructed the jury as follows:

"14. A person charged with crime is permitted to show, as a circumstance in his defense, that his character as to the trait involved in the charge was good previous to its being made; and in cases of doubt, or where the evidence is obscure or circumstantial, it may be a strong circumstance when satisfactorily shown, and may of itself be sufficient to turn the scale in his favor.

"15. But, generally, it is a circumstance of but slight weight, and entitled to but little consideration, when the proof

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1108	69
48	583
112	484
48	583
121	109
122	4
122	108
48	583
126	503

1. CRIMINAL  
law: evi-  
dence: good  
character.

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The State v. Northrup.

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is clear and direct. The jury are to judge of its weight according to the circumstances in the case before them."

It is insisted these instructions are erroneous.

At one time the rule was that evidence of good character was admissible in capital cases only. But at the present day the well-settled law is, that the defendant may introduce such evidence in all criminal cases where the object of the prosecution is to punish the offender for the crime. 3 Greenleaf on Evidence, § 25.

The admissibility being settled, the authorities are not in accord as to its effect, or, rather, whether it should be considered by the jury in all cases, or only those in which there are doubts as to the guilt of the accused.

In 2 Starkie, 303, 7 American Edition, it is said that good character is entitled to but little weight, except in doubtful cases, and substantially the same doctrine will be found in 1 Phillips on Evidence, 469.

In 3 Greenleaf on Evidence, § 25, it is said: "The admissibility of this evidence has sometimes been restricted to doubtful cases, but it is conceived that, if the evidence is at all relevant to the issue, it is not for the judge to decide, before the evidence is all exhibited, whether the case is in fact doubtful or not, nor indeed afterward, the weight of the evidence being a question for the jury alone. His duty seems to be to leave the jury to decide upon the whole evidence whether an individual, whose character was previously unblemished, is or is not guilty of the crime of which he is accused." This view accords with that expressed in 2 Russ. on Crimes, 785, 786; 1 Bishop Criminal Procedure, § 488; and Bennett and Heard's Notes to 2 Leading Criminal Cases, 351. Neither Roscoe nor Wharton have given their individual views, but they have apparently adopted those expressed by Sir William Russell. Roscoe's Criminal Evidence, 76; American Criminal Law, §§ 643, 644.

The leading adjudicated case in favor of the rule that such evidence cannot avail the defendant except in a doubtful case,

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The State v. Northrup.

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is *The Commonwealth v. Webster*, 5 Cush., 295. See also, as being in accord therewith, *The State v. Wells*, 1 Coxe, 424; *United States v. Roudenbush*, Baldwin, 514; *The People v. Hammill*, 2 Parker, 223; *The People v. Cole*, 4 Id., 35; *United States v. Smith*, 2 Bond, 323.

In *Stephens v. The People*, 4 Parker, 396, and *Lowenberg v. The People*, 5 Id., 414, the jury was instructed that good character might raise the doubt entitling the prisoner to an acquittal, and the weight to be given thereto was for the jury in each case. The defendants having been found guilty in each case, no point was raised, as we understand, in the appellate court as to the validity of the instructions.

The doctrine announced in the Webster case has been disapproved and condemned in *Cancemi v. The People*, 16 N. Y., 501; *The People v. Ashe*, 44 Cal., 288; *The People v. Garbutt*, 17 Mich., 9; *Harrington v. The State*, 19 Ohio St., 264. The rule of these cases is sustained by *The State v. Henny*, 5 Jones, N. C., 65; *Jupetz v. The People*, 34 Ill., 516; *The State v. McMurphey*, 52 Mo., 251; *United States v. Whitaker*, 6 McLean, 342; *Commonwealth v. Carey*, 2 Brewster, 414; *Epps v. The State*, 19 Geo., 102; *Felix v. The State*, 18 Ala., 720; *Carson v. The State*, 50 Id., 134; *Ryan v. The People*, 19 Abb. Pr. R., 232.

In *Wesley v. The State*, 37 Miss., 327, it is in substance said that good character is no defense, and the better course is to submit the question as to its effect to the jury; but it would be going too far to lay it down as a fixed rule that it is sufficient to raise a reasonable doubt.

This question was somewhat considered in *The State v. Turner*, 19 Iowa, 144. The opinion is exceedingly brief, consisting of but a few lines so far as this point is concerned, and while it may not be clear and certain, yet we think the only rule established is "that in all cases a good character is to be considered."

The instruction given in that case, it was thought, did not militate against the rule above referred to. As to the correct-

ness of this last proposition we incline to think there may be some doubt.

In substance, the jury were told, in the instructions given in the present case, that evidence of the defendants' good character could not be of any benefit or avail them anything, unless the question of their guilt was doubtful upon a consideration of the evidence other than that in relation to their good character.

As we have seen, the weight of modern authority, whether we look to the text books or adjudicated cases, is in favor of the proposition that the good character of the accused is for the consideration of the jury in all cases, and it is for them to determine its weight without any instructions from the court, such as were given in the present case, and this on principle, we think, must be the correct rule.

If the jury have reasonable doubts of the guilt of the accused, it is their duty to acquit. Hence, in that class of cases, the evidence would be unnecessary and useless. But there may be cases, and undoubtedly are such, where, without such evidence, the jury would and should convict; and with it, they would and should acquit. A long and honorable life must be worth something to a man when accused of a crime in cases other than those where the evidence, independent of his good character, is doubtful or obscure. The conclusive presumption must be indulged that juries follow the instructions of the court. Therefore, under the instructions it was their duty first to determine whether the evidence was doubtful or obscure without reference to that in relation to character, and if this question was determined in the affirmative, then a verdict of guilty follows.

This places the man who affirmatively establishes a good character on the same plane with one who has not or cannot do so. No presumption exists against one who does not attempt to establish a good character except such as can be legitimately drawn from the evidence. Therefore, the same quantity and quality of evidence should make a clear or strong

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The State v. Northrup.

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case against both. The evidence which creates a doubt, unless good character may be considered in determining whether such a doubt exists or not, must necessarily be the same as to all men and cases, if the rule of the instructions in this case be correct.

We cannot subscribe to any such doctrine. Good character, like all other facts in the case, should be considered by the jury, and if therefrom a reasonable doubt is generated in the mind of the jury as to the guilt of the accused, it is their duty to acquit.

Of course we must not be understood as saying that good character is a defense, for it is not as a matter of law. But it is a fact for the consideration of the jury, as are all the other facts in the case, and they must determine its weight in all cases.

II. The jury were instructed that to maintain the defense of *alibi* the burden was on the defendants, but that they were only required to prove it by a preponderance of the evidence. This is in accord with *The State v. Vincent*, 24 Iowa, 570.

It is said there is a want of unanimity in the authorities on this question, and there are differences among the members of the court in relation thereto. *The State v. Hardin et al.*, 46 Iowa, 623. But a majority of the court adhere to the rulings heretofore made, under the belief that the decided weight of authority is in accord therewith.

Other errors are assigned and ably discussed by counsel, but we do not believe them to be well taken. For the reasons above stated the cause is

REVERSED.



## WARD v. THOMPSON.

1. **Intoxicating Liquors: DAMAGES: EVIDENCE.** In an action by the wife for damages for the sale of intoxicating liquors to her husband, whereby she has been injured in her means of support, she may show, to sustain a claim for exemplary damages, the number and age of her children, if she also shows that the defendant, prior to selling the liquor to her husband, had knowledge that she had such children, and that they were in danger of being injured or compelled to leave home.
2. ———: ———: ———. The plaintiff's husband was properly permitted to state about how much he had paid the defendant for liquors during the time for which damages were sought to be recovered, as a fact tending to show the injury the wife had received in her means of support.
3. ———: ———: **ANOTHER ACTION.** Evidence that plaintiff had commenced another similar action against another seller of intoxicating liquors, for damages accruing during the same period, was held to be inadmissible.
4. ———: ———: **PURCHASE BY WIFE.** If the wife purchased liquor for her husband from defendant under compulsion, or to keep him at home, she did not thereby defeat her right of action.
5. ———: ———: **PAIN AND ANGUISH.** Any violent interference with one's person is in law an injury, and mental suffering resulting therefrom is a ground for damages.
6. ———: ———: **BURDEN OF PROOF.** In such an action it was sufficient to instruct the jury with respect to the burden of proof that it was upon the plaintiff.
7. **Verdict: GENERAL AND SPECIAL.** When the jury returned a general verdict for one hundred dollars and a special verdict for two hundred dollars, the court was justified in rendering judgment for three hundred dollars.
8. ———: **AFFIDAVITS OF JURORS.** Affidavits are not admissible to show the understanding of jurors.

*Appeal from Howard Circuit Court.*

MONDAY, JUNE 10.

THE plaintiff is the wife of one William Ward, and claims

## Ward v. Thompson.

that she has been injured in person and in her means of support by the intoxication of her husband, produced by intoxicating liquors sold to him by the defendant. Other facts are stated in the opinion. Verdict and judgment for plaintiff. Defendant appeals.

*H. C. McCarty*, for appellant.

*Sayre & Woodward* and *John T. Stoneman*, for appellee.

ADAMS, J.—I. The plaintiff was examined as a witness in her own behalf, and was permitted to state, against the objection of the defendant, that her family, besides herself and husband, consisted of two children, a son eighteen years old and a daughter thirteen. The defendant claims that the court erred in admitting this evidence, because it was well calculated to influence the jury in regard to the amount of their verdict, and that the verdict should not be greater by reason of the fact that the plaintiff's family included minor children, because the plaintiff can recover only the damage which she has sustained individually in her person and means of support, and that, if the children have sustained damage, they can maintain their separate actions therefor. It must, we think, be conceded that the actual damages which the plaintiff is entitled to recover are not greater by reason of her children. But it appears that she forbade the defendant to sell her husband liquor; that she spoke to him of her husband's habits, and informed him that she could not stay in the house, and that she must leave, or at least send the children away; that her husband continued to frequent the defendant's saloon, and came from there intoxicated; that when intoxicated he was abusive, and that she had to send her daughter away. Now if the defendant continued to furnish the plaintiff's husband liquor upon which he became intoxicated, after he had been informed by plaintiff in regard to her children, and the necessity that there would be of their removal if her husband's intemperate habits continued, it

1. INTOXICATING  
LIQUORS:  
damages:  
evidence.

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Ward v. Thompson.

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was an aggravating circumstance, tending to show a recklessness of consequences, which the jury was entitled to consider upon the question of exemplary damages. In our opinion, then, where a married woman brings an action like the present, she may show the number and ages of her children belonging to her family, if she also shows that the defendant has knowledge that she has such children, and that they are in danger of being injured or compelled to leave home, and the defendant, after such knowledge, wantonly continues to sell the plaintiff's husband liquor, by reason of which she acquires a right of action. The evidence is pertinent to the question of exemplary, but not actual, damages.

II. The plaintiff's husband, as a witness in her behalf, after having stated that he did not know how much money  
2. —: —: he had paid the defendant for whisky during the  
— time for which damages are sought, was allowed to state, against the objection of the defendant, about how much he paid. The defendant contends that the evidence was inadmissible, because it was a mere guess or general estimate. The plaintiff, however, is not entitled to recover for money paid. The amount paid was immaterial, except as a fact, among others, tending to show the injury which plaintiff had received in her means of support. For such purposes the statement of her husband as to about how much he paid was, we think, admissible.

III. The defendant offered to show that plaintiff had commenced an action against another person, covering the same  
3. —: —: grounds as in this action. The court excluded the  
another action. evidence, and the ruling is assigned as error. This court held, in *Engleken v. Webber*, 47 Iowa, 558, that it was error to exclude evidence of judgments obtained against other parties for injuries received by plaintiff from the intoxication of her husband by liquor sold by the parties during the same years during which she received the injuries for which she is seeking a recovery against the defendant. The taking of judgments was thought by a

## Ward v. Thompson.

majority of the court to be an admission that she had received injuries during those years other than those caused by the defendant, and that, if such was the fact, the jury would have been aided by knowing it in determining the extent of the defendant's liability. But the mere bringing of an action cannot be regarded as having the force of an admission, so far as the amount sought to be recovered is concerned, which is the only material consideration. An action is brought for all that the plaintiff thinks it is possible to recover. The allegations of the petition are designed to be broad enough, and more than broad enough, to cover all the evidence which can be advanced in their support. This plaintiff may have averred in her petition in the other case that she received more injury from the acts of that defendant, during the time in question, than she can show in the case at bar that she received altogether during the same time. But she may utterly fail in her proofs in the other case. The averments, then, made in her petition in that case, as to the extent of her injuries, must be considered as made merely for the purposes of the trial of that case, and should not affect her in any other. The mere fact that she claims that she received injuries to *some extent* not yet ascertained, for which the defendant in the other case is liable, is not such that if the jury in this case had knowledge of it, it would aid them in determining the extent of the injuries caused by the defendant.

IV. There was some evidence showing that plaintiff bought liquor for her husband. She said in her testimony: "My  
 4. —: —: husband compelled me to go and get liquor for  
 purchase by  
 wife. him and keep it in the house. I went and got it  
 about four times. Once he compelled me. The other times  
 I got it to keep him away from saloons." With reference  
 thereto, the court gave the following instructions:

"15. If you find that the plaintiff, within the two years in question, wrongfully procured liquor for her husband, and thereby contributed to produce the injury to her means of

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Ward v. Thompson.

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support of which she complains, then, for such injuries which she in part caused, she cannot recover in this action.

"16. But if you find that she only procured the liquor for him through compulsion by him, or if you find that she only procured the same for him for the purpose of keeping him from places where he would be likely to drink more, become intoxicated, and squander his means, and that in so doing she acted with reasonable care under the circumstances, then such acts were not contributory to the wrong and would not defeat her right to recover if otherwise entitled to."

The latter instruction is assailed upon the ground that the plaintiff, in purchasing liquor for her husband, was guilty of a criminal act and was wholly inexcusable, and that the jury should not have been allowed to find that she did not contribute to the wrong. Whether, if she had furnished her husband with liquor with her own money, she would have been liable to prosecution under the statute, we need not determine. The evidence does not so show. In making her husband's purchases for him she was not criminally liable: and whatever may be thought of the acts upon moral grounds, if she had reasonable cause to think that by so doing she would contribute to her husband's temperance rather than intemperance, and prevent the threatened injuries, we are of the opinion that, in legal contemplation, she should not be regarded as having contributed to her injuries.

V. The defendant excepted to an instruction which allowed  
n. —: —: recovery for mental anguish, shame and suffer-  
pain and an-  
guish. ing. The instruction is in these words: "If you find the plaintiff entitled to recover for violence to her person, in measuring such damage it is proper for you to consider any physical pain caused thereby, together with any mental anguish, shame or suffering resulting from such treatment." It is insisted by defendant that there was no evidence to justify the instruction, and that it contravenes the rule held as to wounded feelings, etc., in *Kearney v. Fitzgerald*, 43 Iowa, 580.

## Ward v. Thompson.

The evidence as to injury to the plaintiff's person is found in the testimony of herself and daughter. It shows that the plaintiff was repeatedly thrust violently out of doors by her husband, and compelled to stay all night; at other times he struck her and threw her down. Any violent interference with one's person is in law an injury, and mental suffering *resulting therefrom* is a ground for damages.

The point decided in *Kearney v. Fitzgerald* is not involved in this case. For wounded feelings and disgrace, not resulting from injury to the person, no recovery can be had. See, also, *Calloway v. Laydon*, 47 Iowa, 456.

VI. The court instructed the jury that the burden of proof is upon the plaintiff. The defendant complains of this 6. —: —: burden of proof. instruction as deficient. It is insisted that the court should have gone further and instructed the jury that it was incumbent upon the plaintiff to satisfy them of defendant's guilt beyond a reasonable doubt. It was held in *Barton v. Thompson*, 46 Iowa, 30, where the plaintiff sought to recover for injuries received from an act which was criminal, that the jury should be satisfied that the defendant committed the act beyond a reasonable doubt. Whether that rule should apply in a case where the act is criminal merely because prohibited by statute, we need not determine. The instruction given as to burden of proof is correct. No instruction was asked embodying the rule contended for. The omission to so instruct is not error.

VII. The jury were instructed that if they allowed exemplary damages to render a special verdict for the amount so 7. VERDICT: general and special. allowed. They rendered a general verdict for one hundred dollars, and a special verdict for exemplary damages for two hundred dollars. The court rendered judgment for three hundred dollars. The action of the court in this respect is assigned as error.

The verdict, it must be admitted, is slightly irregular. The exemplary, as well as the actual, damages should have been included in the general verdict. But a verdict, however

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Ward v. Thompson.

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informal, is good if a court can understand it. *Jones v. Julian*, 12 Ind., 274; *McRae v. Colclough*, 2 Ala., 74; *Battles v. Braintree*, 14 Vt., 348; *Meade v. Smith*, 16 Conn., 346. See also Code, § 2812. The judgment must follow the verdict as properly understood. In this case the intention of the jury is beyond question. They intended to allow one hundred dollars actual damages, and two hundred dollars exemplary damages, and the court was justified in rendering judgment for three hundred dollars.

VIII. The defendant moved to set aside the verdict on the ground that the jury, in assessing the exemplary damages, acted under a misapprehension of the law. In support of the motion he filed the affidavit of five jurors, to the effect that they understood from the instruction given that the exemplary damages would go to the school fund, and that the general verdict included all the damages to which they considered the plaintiff entitled. There is nothing in the instruction given to indicate that the exemplary damages would go to the school fund. In the instruction the jury was merely told that by exemplary damages is meant damage by way of punishment to the wrong-doer, and that the amount was in their discretion. We must presume that the jurors, under their oath, allowed simply what they thought was right by way of punishment of the wrong-doer. The amount of the damages allowable was in no way dependent upon whether they were to go to the school fund or not. The statement in the affidavit, that the verdict for one hundred dollars covered all the damage to which they regarded the plaintiff entitled, means simply that it covered her actual damages. She is entitled to the damages rendered by way of punishment merely by a technical rule of law, which the jurors admit that they were ignorant of. Giving the affidavits, therefore, all the force which the defendant can claim for them, it would not appear that the defendant is entitled to have the verdict set aside. But there is still another objection equally insuperable. Affidavits are not admissible

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The State v. Smith.

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to show the understanding of the jurors. See *Wright v. Illinois & Mississippi Telegraph Company*, 20 Iowa, 195 (210), and cases cited. The judgment of the Circuit Court must be

**AFFIRMED.**

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**THE STATE V. SMITH.**

1. **Criminal Law: LARCENY: VALUE OF PROPERTY.** Upon the trial of one indicted for larceny, where the value of the property alleged to have been stolen is in issue, the jury should be instructed to find, as the value of the property, what it would realize in the ordinary course of trade, and not merely what it was worth to the owner.

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*Appeal from Buchanan District Court.*

MONDAY, JUNE 10.

THE defendant was indicted for larceny. The alleged crime consisted in stealing a set of double harness, of the value of twenty-five dollars, from a building in the night time. There was a verdict of guilty, and the defendant was sentenced to the penitentiary for two years.

*Bruckart & Ney*, for appellant.

*J. F. McJunkin*, Attorney General, for the State.

ROTHROCK, CH. J.—I. The evidence shows beyond question that the defendant was guilty of stealing the property described in the indictment.

The contest upon the trial was as to the value of the property. The jury found the value to be twenty-one dollars. Counsel for defendant insists that this finding was not supported by the evidence, and that the jury were not warranted in finding the value of the harness to have been more than twenty dollars. It is true a majority of the witnesses, and



those who seem to be well qualified to estimate the value, fix it at less than twenty dollars. But the owner of the property estimated it at twenty-five dollars, and two other witnesses estimate the value at from twenty to twenty-five dollars. We cannot, therefore, say that the verdict is not supported by the evidence.

II. The court instructed the jury as follows upon the question of the value of the property :

"5. In regard to the value of the property alleged to have been stolen herein, it is not what the harness would bring at a forced sale, nor what a witness would give for it, but what was it worth to the owner at the time it was taken from him."

In view of the fact that the owner of the property was the only witness who testified positively that the value exceeded twenty dollars, we think this instruction was calculated to mislead the jury. It is conceded by the Attorney General that the rule of the instruction is not strictly correct, but he insists that the jury estimated the real value, and that, therefore, the instruction was error without prejudice. We cannot so regard it. If it were not for the testimony of the owner of the property, the verdict should have been set aside for want of evidence to support it.

His evidence was a mere general statement of value, without more.

What the basis of his valuation was does not appear.

The jury should have been instructed to find the real value of the harness in the market ; that is, in the ordinary course of trade or business between buyers and sellers of that kind of property.

**REVERSED.**

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The State v. Scott.

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## THE STATE v. SCOTT.

1. **Criminal Law: LARCENY: EVIDENCE.** Where, upon the trial of one indicted for larceny, the value of the property alleged to have been stolen is in issue, the verdict of guilty will not be disturbed unless so manifestly against the evidence as to raise the presumption that it was not the result of an honest and intelligent exercise of the judgment of the jury.

*Appeal from Mills District Court.*

MONDAY, JUNE 10.

THE defendant was indicted and convicted of grand larceny, and now appeals to this court. The facts of the case appear in the opinion.

*C. N. Rood and Watkins & Williams, for appellant.*

*J. F. McJunkin, Attorney General, for the State.*

BECK, J.—I. The only objection to the judgment of the District Court presented in the argument of defendant's counsel is based upon the claim that the testimony shows the value of the property stolen was less than twenty dollars. It must be admitted that upon this point there is conflict. The testimony of the State shows the value to be above twenty dollars, while the witnesses for the defendant fix a value far lower. The most valuable of the articles stolen was a gun. The State's witnesses testify it was worth from fifteen to twenty dollars; defendant's witnesses fix the value at from six to eight dollars. These witnesses appear from their occupations to be better qualified to give an opinion of the value than those testifying for the State. Were we permitted to determine the value from the evidence before us, we would not hesitate to adopt a conclusion based upon the testimony for the defendant. But this we cannot

1. CRIMINAL  
law: larceny:  
evidence.

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The State v. Knowles.

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do, and must permit the conviction to stand, unless, as shown by the record, there is such want of testimony in support of the verdict that a presumption arises it was not the result of an honest and intelligent exercise of the judgment of the jury applied to the evidence before them. No such conclusion is authorized by the record.

II. Some of the articles alleged to have been stolen were not found in the possession of defendant. Their value as fixed by the testimony, it is urged, was, or may have been, included in the value of the goods stolen, as found by the jury. We are unable to say this was not authorized by the evidence. We cannot determine from the record before us that the evidence did not authorize the jury to find these articles were stolen by the defendant.

III. No other objections were made to the judgment of the court below, and upon inspecting this case as presented to us we find no errors therein.

**AFFIRMED.**

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THE STATE v. KNOWLES.

1. **Criminal Law: CONFESSION.** A confession by one charged with forgery that he wrote the name of the party whose name is charged to have been forged, is not sufficient to authorize a conviction without other proof that the crime was in fact committed by some one.

*Appeal from Hardin District Court.*

MONDAY, JUNE 10.

ROTHROCK, CH. J.—After the filing of an opinion in this case a petition for rehearing was presented, upon which the cause was again submitted for our consideration.

It is stated, in the fourth point of the opinion, that a cer-

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The State v. Knowles.

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tain instruction which is complained of by the defendant, although appearing in the record, does not appear to have been given or refused. It now appears from an inspection of the original instruction that it was given to the jury. This is not now disputed by the Attorney General, and by consent the original record has been produced for our inspection. Said instruction is in these words:

"The confession of the defendant, that he wrote Daniel Slack's name on the note charged to have been forged, will warrant you in finding said defendant, Philip Knowles, guilty, if you have other proof that said note was forged, and that the said offense was committed; and in order to find said Philip Knowles guilty it is not necessary to prove that said Philip Knowles forged said note in any other manner than by proving the said Philip Knowles' admissions that he wrote Daniel Slack's name on said note."

This instruction is erroneous, especially in the latter clause. It is true, the confession of the defendant that he committed the crime charged is sufficient to warrant a conviction, if accompanied by other proof that the crime was in fact committed by some one. A confession implies that the matter confessed is a crime, and unless the defendant admitted that he wrote the name of Daniel Slack to the note with a fraudulent intent, his statement was not a confession; because he may have intended, by such confession, to imply that the act was done rightfully. We think the instruction was erroneous, because of its tendency to lead the jury to believe that the mere statement of the defendant that he wrote Slack's name to the note was to be considered by them as a confession that he had committed forgery.

For the error in this instruction the judgment must be

REVERSED.

## BOND V. EPLEY.

1. **Judgment: VACATION OF.** Proceedings to vacate a judgment for fraud practiced by the successful party, and unavoidable casualty and misfortune preventing a defense, must be commenced within one year from the date of the judgment, and notice thereof must be served upon the successful party, or his attorney, within that time.
2. ———: ———: **EQUITABLE JURISDICTION.** A court of equity will grant a new trial in an action at law, after the time for applying for relief under section 3157 of the Code has elapsed, only when proper reasons are shown for the application. Where a party was advised that the judgment had been obtained and then delayed nearly a year before making the application, when the time allowed by statute therefor had elapsed, it was *held* that he was not entitled to equitable relief.
3. ———: ———: **NOTICE.** A notice of the commencement of the action served upon the wife of defendant, who was out of the State, and duly published in a weekly newspaper, summoning the defendant to appear at the time specified in the District Court of Linn county, was held sufficient as to place, and gave the court jurisdiction to render a judgment *in rem* against the attached property.
4. ———: ———: **APPEARANCE.** Where an attorney appears for an absent defendant, and the latter, in a proceeding to vacate the judgment, alleges that the appearance was unauthorized, he has the burden to establish the fact by a preponderance of testimony.

*Appeal from Linn District Court.*

MONDAY, JUNE 10.

On the 20th day of October, 1874, Bond recovered judgment against Epley upon two promissory notes for six thousand three hundred and fifty-two dollars and fifteen cents, and costs, with an order for special execution against attached property, the judgment to draw interest at the rate of eighteen per cent. On the 6th day of October, 1875, the defendant served notice on Hubbard & Deacon, the attorneys of record for the plaintiff, of an application of the defendant for vacation of the judgment, on account of unavoidable casualty and

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Bond v. Epley.

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misfortune. On the 18th day of October, 1875, the defendant filed his petition asking the court to vacate the said judgment on account of unavoidable casualty and misfortune, and fraud on the part of the plaintiff in procuring the same. On the 22d day of October, 1875, the defendant filed his amended and substituted petition for the vacation of said judgment, alleging that the judgment was obtained by the fraud of the plaintiff; that the defendant was unable to defend the action on account of unavoidable casualty and misfortune; and that he has a good and meritorious defense. Notice of this petition was served on plaintiff on the 22d day of January, 1876.

On the 1st day of March, 1876, the defendant filed an amendment to his petition, alleging, as an additional ground for the vacating of the judgment, that the court had no jurisdiction of the cause of action, because the notice left at the house of the defendant, in the city of Denver, Territory of Colorado, was not sufficient in law, and did not comply with the requirements of the law in order to bring defendant into court and hold him to answer.

On the 5th day of April, 1876, the court made the following order in the premises: "And now, on this day, April 5, 1876, this cause comes up for hearing on the motion of the defendant to set aside and open up the judgment heretofore, to-wit: October 20, 1874, rendered against said defendant, J. J. Epley, and in favor of the plaintiff, H. G. Bond—I. N. Whittam and R. H. Gilmore appearing for the defendant—and the court, having heard the arguments of the counsel for the defendant, overrules the motion on the ground that the proceedings under said motion were not commenced in time. Defendant has leave to amend petition for new trial. Cause transferred to the equity side of the docket and continued."

On the 27th day of April, 1876, the defendant filed his amended petition in equity for the vacation of the judgment. This petition in substance alleges that the action was com-

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Bond v. Epley.

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menced on the 25th day of May, 1874, and judgment was rendered in the Linn District Court on the 20th day of October, 1874, for six thousand three hundred and fifty-two dollars and fifteen cents, with interest at the illegal rate of eighteen per cent; that defendant was a resident and citizen of the Territory of Colorado, and was not in court by person or attorney when the judgment was rendered; that the plaintiff fraudulently delayed the service of notice, and on the 10th day of September caused the first publication of notice, and on the 14th day of September caused notice of the suit to be left with defendant's wife in the city of Denver, when plaintiff knew defendant was absent from home, distant four hundred miles, across three ranges of the Rocky Mountains, beyond the reach of public mails or any public conveyance, and distant, as computed by time from Denver, twenty-five or thirty days, and that service of notice was so delayed with the design of preventing the defendant from appearing and defending the action; that defendant, because of his great distance from communication, did not know of the pendency of the suit until the 14th day of November, 1874, and thus, by unavoidable casualty and misfortune, was prevented from defending. The petition further alleges in detail the grounds of defendant's defense to the plaintiff's cause of action. The plaintiff's answer to this petition, in substance, admits the allegation as to the judgment drawing interest at eighteen per cent; alleges that it was so entered by mistake, and consents that it be so amended as to draw interest at ten per cent; admits the residence of defendant in Colorado; that he was absent from home as alleged when notice was served, and that at the time of the entry of judgment he was not in court by person or attorney. The answer denies the other material allegations of the petition.

On the 21st of March, 1877, the cause was referred, the referee to make up and try issues of law and fact. On the 4th of May, 1877, the plaintiff filed an amendment to his answer, withdrawing the admission that, at the time judgment

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was entered, defendant was not in court in person or by attorney, and averring that defendant was present by attorney at that time. The defendant replied to this amendment as follows: "After the attachment proceedings, and the garnishment of Elihu Baker for over \$900, I. N. Whittam, attorney at law at Cedar Rapids, without any authority from defendant, appeared in this cause, and signed a stipulation, which was filed and entered in the appearance docket, before the judgment was obtained. The appearance was wholly unauthorized; the defendant did not know of such appearance until a long time after the judgment had been entered for the plaintiff. The defendant never ratified or confirmed in any way the said act of Whittam, and the said Whittam did not cause his name to be entered as attorney for said defendant in said action, before the judgment entry, except as hereinbefore stated; that he was not present in court, either personally or by attorney, at the time of the entry of said judgment; that said judgment was by default; that he had not been served with process, personally or by publication, as provided by law, and that he did not know that such an action had been commenced against him, or the nature of such action, until long after the judgment had been entered."

The cause came on for hearing August 14, 1877, and on the 10th of November the referee filed his report, finding as a matter of law that there is no equity in defendant's petition, and that it should be dismissed, and that plaintiff's judgment should be so modified as to draw interest at ten per cent. Decree was entered in accordance with this report. Defendant appeals.

*R. H. Gilmore*, for appellant.

*Hubbard, Clark & Deacon*, for appellee.

DAY, J.—I. Proceedings to vacate a judgment for fraud practiced by the successful party, and unavoidable casualty or misfortune preventing the party from defending, must be by



petition verified by affidavit, and must be commenced within one year after the judgment or order was made. Code, §§ 3154 and 3157. The judgment in this case was entered on the 20th day of October, 1874. The original petition for the vacation of the judgment was filed October 13, 1875, seven days before, and the amended and substituted petition was filed October 22, 1875, two days after the expiration of the year from the rendition of the judgment. Notice of the application was not served upon the plaintiff until January 26, 1876, more than fifteen months after the judgment was rendered. The court overruled the application upon the ground that the proceedings were not commenced in time. This ruling was, we think, correct under the statute. But, whether correct or not, it cannot now be reviewed. No exception was taken to the ruling, but the cause was transferred to the equity docket, and twenty-two days thereafter the defendant filed an amended petition in equity, seeking relief upon equitable grounds. The defendant's right to relief must be determined by the case made in this equitable proceeding.

II. The petition in equity was filed a little more than eighteen months after the rendition of the judgment. The facts relied upon for relief are the same as those stated in the substituted petition of October 22, 1875, namely, fraud of plaintiff in delaying service of notice till defendant was beyond communication, and unavoidable casualty preventing him from defending, in that he did not know that the suit was commenced until after judgment was rendered. Not a fact is stated which was not known to defendant, from his own showing, as early as November 14, 1874, less than one month after the judgment was rendered. The case is simply this: The defendant, having neglected to make his application at law for relief within the time allowed by statute, resorts to a court of equity for relief, without furnishing any excuse whatever for the delay, or showing that a single fact has come to his knowledge which was not known to him in time to have made his application under the statute, within the year. Under

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Bond v. Epley.

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these circumstances equity will not grant relief. A court of equity will grant a new trial in an action at law, after the time for applying for relief under section 3157 of the Code has elapsed, only when proper reasons are shown for the application. *District Township of Newton v. White*, 42 Iowa, 608; *Bowen v. Troy Portable Mill Company*, 31 Id., 460; *Partridge v. Harrow*, 27 Id., 96; *Hoskins v. Hattenback*, 14 Id., 314.

It is claimed that the court had no jurisdiction to render the judgment. If this be true the defendant should be relieved against it, notwithstanding the delay in making the application. The notice, a copy of which was served upon the wife of the defendant Epley, and which was duly published in a weekly newspaper, is as follows: "You are hereby notified that on or before the 1st day of June, A. D. 1874, there will be on file in the office of the clerk of the District Court of Linn county, Iowa, the petition of the plaintiff aforesaid, claiming of you the sum of five thousand three hundred and forty-four dollars and sixty-eight cents, as money justly due from you on two promissory notes, and interest thereon at one and one-half per cent from the 3d day of October, A. D. 1873, until paid, and that a writ of attachment issue to secure the same and costs of this suit. You are also notified that unless you appear thereto, and defend before noon of the second day of the term of said District Court of Linn county, to be held on the 19th day of October, A. D. 1874, a default will be entered against you, and judgment rendered thereon." This notice complies fully with the provisions of section 2599 of the code. It is almost an exact copy of the form for notice prescribed in section 2518 of the Code of 1851, with the addition that it named the term of court at which defendant is required to appear, as provided in sections 2599 of the Code of 1873, and 2812 of the Revision, which provision is not contained in section 1715 of the Code of 1851. The defendant claims that this notice is defective, in that it does not inform the defendant of the *place where* he must appear and defend the action. Reliance is placed upon the case of

Bond v. Epley.

*Kitsmiller v. Kitchen*, 24 Iowa, 163. In that case the notice concluded after making a statement of what the petitioner claimed, and did not notify the defendant that he was required to appear and defend anywhere, or at any time. It is with reference to this state of facts that the court say that "the failure of the original notice to inform the defendant as to the place where, and the time when, he must appear and defend the action, was a substantial and fatal defect." In this case both time and place are stated. The time is the 19th day of October, 1874; the place is the District Court of Linn county. The case of *Kitsmiller v. Kitchen* does not hold that the city or town in which the court is to be held must be stated, and the statute makes no such requirement. The notice was clearly sufficient to authorize a judgment *in rem* against the attached property.

IV. There is, however, another view of this case which is satisfactory, and which disposes of the claim made by defendant in argument, that the judgment is a personal appearance. one, erroneously rendered, and that he is entitled to have the cause retried under section 2877 of the Code, which provides that defendants served by publication only, and who do not appear, may at any time within ten years after the rendition of the judgment, upon giving security for costs, be admitted to defend. The amended answer of the plaintiff alleges that the defendant was present by attorney when the judgment was rendered. The reply alleges that J. N. Whittam, attorney at law at Cedar Rapids, appeared in the cause, and signed a stipulation before the judgment was obtained, but that the appearance was wholly unauthorized. The fact of appearance being thus admitted, the burden is upon the defendant to establish that the appearance was unauthorized. Upon the trial the defendant offered an *ex parte* affidavit of J. N. Whittam, that he had no authority to appear for defendant, and did not intend to appear so as to bind him in the case. This affidavit was objected to because it was *ex parte*, and the plaintiff had no opportunity to cross-examine. The court

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Bond v. Epley.

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excluded the affidavit. This ruling was clearly correct. The only evidence respecting the employment of Whittam is the following in the cross-examination of Epley: "I don't think I told him (Green) I had made arrangements to have suit defended. I didn't understand what the nature of the case was at that time. I had made no arrangements in regard to the suit, and knew nothing of it. I may have said that Whittam had been attending to my business and might look after it for me. I knew Whittam, an attorney at Cedar Rapids. I have no recollection of either my wife or myself corresponding with him during that summer." If Epley had no arrangement whatever with Whittam which would authorize his appearance in the case, it seems incredible that he should not distinctly and unequivocally so state. Defendant's attorney excuses the indirectness of the testimony upon the ground that when the deposition was taken there was an admission in plaintiff's answer that the defendant did not appear by attorney, and there was, therefore, no necessity of proof upon the subject. But the amended answer, alleging that defendant did appear by attorney, was filed on the 4th day of May. The cause did not come on for hearing until the 14th day of August. The defendant might, in the meantime, have retaken the testimony of Epley, or, if the time was not sufficient for that purpose, he might have moved for a continuance upon that ground. We discover no sufficient reason for disturbing the judgment of the court below.

**AFFIRMED.**

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Smith v. Bond.

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SMITH v. BOND ET AL.

AND

BOND v. EPLEY ET AL.

*Appeal from Linn District Court.*

MONDAY, JUNE 10.

THESE cases grow out of the preceding case of *Bond v. Epley*. The first of the above cases is a proceeding for an injunction to restrain Bond from enforcing his judgment, recovered in the former case, against certain property attached in that case. The plaintiff alleges that he purchased the property from Epley, and that the judgment is no lien thereon. He also refers to the facts alleged in the petition to vacate the judgment in case of *Bond v. Epley*, and alleges that the judgment includes illegal interest. A temporary injunction was granted as prayed. The second of the above causes is an action by Bond to set aside a conveyance by Epley to Smith, of the real estate attached in the main action of *Bond v. Epley*. The petition alleges that the conveyance is fraudulent.

The defendant denies the fraudulent conveyance, and alleges that the judgment in the main action of *Bond v. Epley* was fraudulently recovered, without jurisdiction, and bears illegal interest. The causes were consolidated, and were referred, to be considered in connection with the main case of *Bond v. Epley*. The referee found as matter of law that the petition of *Norman E. Smith v. Bond et al.* should be dismissed, and the temporary injunction dissolved. The referee further found that the deed from Epley to Smith was fraudulent, and should be set aside. Decree was entered in accordance with the recommendation of the referee. In the first case the plaintiff appeals. In the second case the defendants appeal.

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 Bevier v. Bevier.
 

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*R. H. Gilmore, for appellants.*

*Hubbard, Clark & Deacon, for appellees.*

DAY, J.—None of the evidence respecting the conveyance from Epley to Smith is contained in the record. The cases are submitted solely upon the questions presented as to the validity of the principal judgment recovered in the main case of *Bond v. Epley*. The holding in that case that the judgment was rendered upon sufficient notice, and appearance by attorney, disposes of all the questions involved in these cases. The judgment in that case was corrected as to the illegal interest, and hence there is no ground for the continuance of the injunction in *Smith v. Bond et al.*

The judgment in each case is

**AFFIRMED.**

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**BEVIER V. BEVIER.**

1. **Evidence; SIGNATURE: LEASE.** A party seeking to establish the genuineness of the signature to an unrecorded lease has the burden of proof, and if the preponderance of testimony be against the genuineness any claim based thereon must fail.

*Appeal from Mitchell District Court.*

MONDAY, JUNE 10.

THIS action is brought to establish an unrecorded life lease upon one hundred and twenty acres of land as against a subsequent conveyance. The land was formerly owned by the plaintiff's wife. He avers that on the 3d day of June, 1868, his wife, Louisa A. Bevier, executed to him a life lease of the land. Immediately afterward she executed to the defendant (her and plaintiff's son) a deed of the land by way of gift. The plaintiff joined in the deed, and it was not made subject to any life lease. The conveyance was made, it appears,

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Bevier v. Bevier.

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because Mrs. Bevier was in feeble health and wished to make some provision for the defendant during her life-time. Soon afterward she died. The defendant took possession of the land in question, cultivated it and received the proceeds for several years, and made improvements. In the spring of 1876 a difficulty arose between plaintiff and defendant's wife, and he brought this action to establish his life lease, averring that at the time the defendant took possession, and commenced cultivating and improving the land, he had notice of plaintiff's life lease. The defendant denies that he had such notice; denies the execution of the lease, and denies the genuineness of what purports to be his mother's signature. The court rendered a decree establishing the lease. Defendant appeals.

*H. F. Miller and Cyrus Foreman, for appellant*

*L. M. Ryce, for appellee.*

ADAMS, J.—It was incumbent upon the plaintiff to prove  
1. EVIDENCE: the genuineness of the signature to the lease by  
signature: a preponderance of evidence. Upon this point  
lease. he testified that he was acquainted with his wife's handwriting, and that in his opinion the signature was genuine. He was not allowed to testify that he saw her write it, because the transaction was between him and a person then deceased, and the defendant claimed through such person. Two bankers were called as experts, who testified, from a comparison of the signature in question with admitted genuine signatures, that they believed the signature in question to be genuine. On the other hand, the defendant testified that he was acquainted with his mother's handwriting, and that in his opinion the signature in question was not genuine. He was corroborated by two bankers called as experts, who testified from a comparison of handwriting. So far the evidence might be regarded as substantially balanced. But the defendant called as a witness his brother, Hutchinson Bevier, a person thirty years old, who testified that he was acquainted

## Rausch v. Moore.

with his mother's handwriting, and did not think that the signature in question was genuine. We are unable to say, therefore, that the preponderance of evidence is in favor of plaintiff.

REVERSED.

## RAUSCH V. MOORE.

1. **Verification: ATTORNEY.** In an action aided by attachment the affidavit of the attorney to the effect that the facts set out in the petition are better known to him than to the plaintiff, and that he knows them to be true, constitutes a sufficient verification.
2. **Attachment: DISCHARGE OF: PRACTICE.** It is competent to move to discharge an attachment upon real estate where the question of ownership is in issue, when the facts upon which the motion is based are conceded.
3. ———: **DOWER: NOT SUBJECT TO ATTACHMENT.** The unassigned dower interest of a widow in the real estate of her deceased husband is not subject to attachment in an action at law. *SEEVERS, J., dissenting.*

*Appeal from Tama Circuit Court.*

TUESDAY, JUNE 11.

THIS is an action upon a judgment of the Circuit Court of La Salle county, Illinois. It is averred in the petition that the defendant is a non-resident of the State of Iowa. An attachment was issued, the return to which shows that it was levied upon the undivided interest of Maria A. Moore (defendant) in certain real estate.

The defendant appeared to the action and moved to discharge the attachment, upon the following grounds:

1. For want of a sufficient verification to the petition.
2. The only right the defendant had to the real estate, when the attachment was levied thereon, was the right to have dower assigned to her therein as the widow of one William Moore.

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85	282
48	611
91	407
48	611
105	376
48	611
111	484
48	611
1125	451
48	611
139	413



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Rausch v. Moore.

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In support of the second ground of the motion an affidavit was filed showing that in January, 1864, William Moore, who was seized in fee of said lands, died intestate, leaving surviving heirs—his widow, Maria A. Moore, defendant herein, and two children; that the only right defendant had in said lands, was the right to demand and have dower assigned, and that she had never in any manner asserted her right thereto, nor demanded that her dower should be assigned to her.

The said affidavit was not controverted. The motion was sustained by the court, and the attached property was discharged. Plaintiff appeals.

*D. D. Applegate and L. G. Kinne, for appellant.*

*Struble & Goodrich, for appellee.*

ROTHROCK, CH. J.—I. The verification to the petition is in these words:

"I, G. S. Eldridge, being duly sworn, on oath say that I am the agent of the plaintiff in the foregoing petition for the collection of the debt declared on in the above petition; that I have read the foregoing petition and know the contents thereof; that, as attorney for the late William Rausch, I obtained the judgment herein declared on, and am more conversant with the facts alleged in said petition than is plaintiff himself, and the facts therein stated are true as I believe.

"And I further depose and say, that the facts alleged as grounds for the issuance of a writ of attachment are known to me, and said allegations are true."

Section 2673 of the Code provides "that if the statements of a pleading are known to any person other than the party, such person may make the affidavit, which shall contain averments showing affiant competent to make the same." Measured by the requirements of this section, we think the foregoing affidavit was sufficient. As to the facts set forth as the ground for the attachment, there can be no question.

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Rausch v. Moore.

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The affidavit sets forth that these facts are known to affiant, and that they are true. No further showing of competency is required than a personal knowledge of the facts as to the existence of the judgment, and the fact that it is unpaid. We think a showing that affiant was the attorney who obtained it, and is now the agent for its collection, and that he is more conversant with the facts than plaintiff, who is an executor, is a sufficient showing of competency, and fully as satisfactory as if made by the plaintiff.

II. It is urged by counsel for appellant that it was not competent for the court to entertain the second ground of the motion to discharge the attachment.

2. ATTACH-  
MENT: dis-  
charge of:  
practice.

The argument is that the statute does not contemplate a summary trial of the title or ownership of real estate on motion and affidavits in a suit by attachment.

Section 3018 of the Code provides that "a motion may be made to discharge the attachment or any part thereof, at any time before trial, for insufficiency of statement of cause thereof, or for other cause making it apparent of record that the attachment should not have issued, or should not have been levied on all or some part of the property held."

The last clause of this section is very general in its terms, and, we think, embraces all questions as to the right to levy upon the property, which may properly be determined by motion.

If the title to real estate be a matter of dispute between the parties upon the facts, it could not properly be determined upon a motion, supported and controverted by affidavits.

If the statements of fact contained in the motion be denied, the defendant would have to proceed in a more formal manner to try the right to hold the property on the writ. But when, as in the case at bar, the motion is not denied, and the simple question to be determined is whether the land is liable to the attachment, we see no objection to disposing of

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Rausch v. Moore.

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it upon the motion in a summary manner. No prejudice can result from such a proceeding.

Lastly, it is claimed that the unassigned dower interest of the defendant in the land in question was subject to the attachment. This is the principal question in the case.

The court below held that it was not liable to be seized under the writ. Where the common law dower of a life estate is in force, the great weight of authority is that, until it is assigned or set apart to the dowress, it is not liable to attachment on execution, in a suit at law by a creditor of the widow. Counsel for appellant concedes that this rule is supported by a majority of the cases. We need not take the space to make citations. The rule, upon examination, will be found to be nearly uniform in the courts of England and this country.

It is insisted however, that in the case at bar the defendant, as widow, is entitled to one-third in fee simple of the land in controversy; that the descent was cast at the death of the husband, and that she is a joint tenant with the children of her husband, and for these reasons the rule applicable to common law dower should not apply.

The defendant's husband died in 1864, seized of the land. The dower right was fixed by section 1, chapter 151, Laws of 1862, which provides that "one-third in value of all the real estate, in which the husband at any time during the marriage had a legal or equitable interest, \* \* \* shall, under the direction of the court, be set apart \* \* \* as her property in fee simple. \* \* \*"

We have held that this statute did not abolish or take away the estate of dower, but that it merely enlarged it from an estate for life to a fee simple. *Moore v. Kent*, 37 Iowa, 20; *Kendall v. Kendall*, 42 Id., 464.

If, then, the fee simple estate given by the statute is merely the common law dower estate enlarged, we can see no reason why it should be subject to execution or attachment in a suit

at law, before assignment, in the one case, and not in the other. All the incidents of dower attach to the fee simple estate, the same as to the life estate, the only difference being duration.

It must be remembered that the statute above cited did not abolish the estate of dower, but, on the contrary, expressly recognized it by providing that "all the provisions hereinbefore made in relation to the widow shall be applicable to the husband of a deceased wife. Each is entitled to the same right of dower in the estate of the other. \* \* \*

Whether the provision which the Code makes for a widow out of the lands of her deceased husband creates an estate liable to be seized upon attachment in a suit at law we do not determine, as the question is not presented. It may not be improper to observe, however, that although by section 2440 of the Code the estate of dower is abolished, and in section 2441 the estate given to the widow is designated as "the distributive share of the widow," yet under the Code, as well as under the act of 1862, it is a materially different estate from that derived by descent.

The estate of an heir is an undivided interest in each and every tract of land owned by the ancestor at the time of his death. Subject to the debts of the ancestor, it may be levied upon by execution or attachment, and sold as the property of the heir.

The estate of the widow embraces one-third in value of all the real property owned by the husband at any time during the marriage which has not been sold on execution or other judicial sale, and to which she has made no relinquishment of her right. It cannot be defeated by will. It is not liable for the debts of the husband. It must be so set off as to include the ordinary dwelling-house, unless she prefers a different arrangement. It may all be assigned and set off in one or more tracts.

It is, therefore, obvious that the levy of an execution or attachment upon the lands of which the husband died seized,

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Hausch v. Moore.

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may or may not be a levy upon that part which may be set off to the widow as her share.

We do not determine what, if any, remedy the creditor of a widow may have as against her unassigned dower. The question is not presented in this record. We only determine that the settled rule that dower unassigned is not liable to execution or attachment in a suit at law was not changed by the statute of 1862 above cited.

AFFIRMED.

SEEVERS, J., *dissenting*.—As I understand, a widow at common law cannot before assignment convey her dower to a stranger by any of the ordinary modes of conveying freehold estates, so as to vest the legal interest in her grantee. *Tompkins v. Fonda*, 4 Paige's Ch., 448. A widow's dower before assignment is a mere right in action and nothing more. *Rayner v. Lee*, 20 Mich., 384. She cannot maintain ejectment before assignment. *Shields v. Batts*, 5 J. J. Marsh., 12. It may be released, but the widow cannot invest another with the right of action. *Cox v. Jagger*, 2 Cow., 638. She had no right of entry until her dower was assigned. *Stedman v. Fortune*, 5 Conn., 464, citing Litt., §§ 36, 53; 2 Black. Com., 134, 139; Bac. Abr., title "Dower B."

The widow was entitled to possession during her quarantine, a period of forty days after her husband's death, and the dower, being unassigned, could not be set up against one holding the fee after the expiration of the quarantine. *Cavender v. Smith*, 8 Iowa, 360. The right of the widow to sell her dower before it has been assigned has been usually, if not universally, recognized in equity, and such interest set apart to her grantee or assignee. *Huston v. Seely*, 27 Iowa, 183, and authorities there cited.

If she is in possession and entitled to an immediate assignment, and has received the whole income of the premises, either as guardian of the heir at law, or otherwise, she, upon taking an account thereof, will be entitled to retain her third,

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Rausch v. Moore.

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although her dower has not been assigned. She has no right, therefore, in conscience or in equity to deprive her creditors of the benefit of her right of dower, for the satisfaction of their debts, by continuing in possession with the heirs and neglecting to ask for an assignment. *Tompkins v. Fonda*, before cited.

It will be readily seen that the widow's right under the statute is very different from what it was at common law. There is no substantial difference between the law of 1862 and the Code, and it was said by BECK, J., in *Mock v. Watson*, 41 Iowa, 241, that the rules and principles found in the books applicable to the estate of dower are inapplicable here. Such is the rule in Indiana, where there is a similar statute. *Gaylord v Dodge*, 31 Ind., 41.

In 1864 the defendant, under the statute, became entitled to an estate in fee simple, which at once on the death of her husband became a vested interest. It was unnecessary for the full and complete protection of that interest that it should be assigned or set apart. She and the heirs of her husband, from the moment of his death, became tenants in common, and partition could be had by either. She could sell and convey her interest to a stranger, although no assignment had been made, and her grantee would become entitled to all her rights. If no partition was had she would be entitled to her share of the rents and profits, whether in possession or not.

Being invested with such an estate as this, the defendant contracted debts, for aught that appears for her support, to enable her to live, and it may well be assumed credit was extended to her on the faith of said estate.

Why drive the creditor into equity? The estate is legal—there is nothing of an equitable nature pertaining thereto. The Code provides that any property of the defendant not exempt from execution may be attached (section 2949), and the same is true as to executions. From the time of the levy of either a lien is created. The statute further provides that

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Rausch v. Moore.

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judgments of courts of record are liens on the real estate of the defendant in the county where the judgment is rendered. Code, §§ 2882, 2883.

There is, then, according to the opinion of the majority, a fee simple or legal estate which cannot be attached or levied on under an execution against the owner, and on which a judgment against such owner is not a lien. To my mind the mere statement of such a proposition is the strongest possible argument against it.

In Connecticut it is held that the statute gives the widow the right of possession, and that her right of entry does not depend upon an assignment, and that she and the heirs are tenants in common, and that the unassigned dower of a widow can be taken on execution for her debts. *Stedman v. Fortune*, before cited, and *Wooster v. Lyman Iron Company*, 38 Conn., 256; *Greathead's Appeal*, 42 Id., 374. These decisions are based on the construction given the statute as to the right of entry and possession before assignment, and are the logical results of such ruling. These decisions, it seems to me, are clearly applicable to our statute.

It having been held that the right of the widow, whether called dower or distributive share, vests in her free from the debts of her husband, her rights are amply protected, and when she succeeds to the estate it should be held liable for her debts.

The fact that she may have her right assigned from the aggregate of the lands and not in each particular tract can make no difference, because the creditor only gets, in the tract attached or levied on and sold, whatever right the widow had therein. If she had none he gets nothing. If she had an interest, and her right is afterward set apart, it will prove an easy matter to adjust her interest. Her rights of homestead, of course, cannot be affected by any levy or attachment. But it is useless to discuss these matters, as the record fails to disclose that the husband died seized of any other lands than

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those attached, and it sufficiently appears the defendant is, and ever since the death of her husband has been, a resident of another State, and, therefore, is not entitled to a homestead right in the lands in question. For these reasons I am unable to assent to the foregoing opinion.

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BEAR v. THE B., C. R. & M. R. CO. ET AL.

O'HANLAN & O'HARA v. THE SAME.

HIGLEY & BRO. v. THE SAME.

1. **Mechanic's Lien : RAILROAD : JUDICIAL SALE.** The Burlington, Cedar Rapids & Minnesota Railway Company failed to pay the interest on its bonds November 1, 1873. The bondholders funded the interest coupons upon the bonds for the term of eighteen months, until May 1, 1878, and continued the railway company in possession and operation of the road until May 19, 1875, when proceedings for foreclosure were instituted, and the road was placed in the hands of a receiver, a decree of foreclosure being subsequently entered. The road was sold thereunder, and purchased by the bondholders, who conveyed it to the Burlington, Cedar Rapids & Northern Railway Company, who have since operated it. In September, 1874, the plaintiff furnished material for and constructed certain fence for the company, for which he presented a bill which has been on file in the office of the auditor since September 25, 1874, and on that date the company gave plaintiff a note for the amount, the said note being entered on the bills payable book of the company. On the 28th of November, 1876, the plaintiff filed his mechanic's lien: *Held*, that the lien not being filed until after the lapse of more than ninety days, and the purchasers of the road having acted in good faith, the lien could not be enforced.

*Argument 1.* A mere entry upon the books of the old corporation could not be construed into notice to the bondholders that plaintiff was entitled to a lien.

*Argument 2.* A judgment creditor, purchasing at judicial sale, stands upon the same footing, and is entitled to the same protection, as any other purchaser.



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*Argument* 3. The B., C. R. & M. Ry. Co., during the eighteen months it operated the road after default in interest, was not the trustee of the bondholders.

2. ———: REPAIRS: PRIORITY OF MORTGAGE. The lien of a mechanic for repairs upon a completed railway is not paramount and superior to the lien of a mortgage executed after the commencement and before the completion of the road.
3. ———: ———: ———. Nor will the lien of the mechanic upon the particular work performed by him take precedence of the mortgage, when the improvements he has made constitute an integral part of the road.

*Appeal from Linn Circuit Court.*

TUESDAY, JUNE 11.

THE plaintiffs claim mechanic's liens upon the railroad known as the Burlington, Cedar Rapids & Minnesota Railway, now the Burlington, Cedar Rapids & Northern Railway. The cause was submitted to the court upon an agreed statement of facts, substantially as follows:

The Burlington, Cedar Rapids & Minnesota Railway Company was organized in 1868, for the purpose of building a railway from Burlington, *via* Cedar Rapids, to the north line of the State. The main line was built in three divisions. The first division, from Burlington to Cedar Rapids, was completed about July 26, 1870; the second division, from Cedar Rapids to Waterloo, was completed about January 26, 1871; the third division was finished about December 1, 1872. Work was commenced on each of the first two divisions in the year 1866, and was prosecuted in 1867, 1868 and 1869; and prior to May 1, 1869, there had been expended on the three divisions the sum of one hundred and fifty-five thousand dollars in the preparation of the road-bed, and all upon the first two divisions except the cost of the survey of the third division. On May 1, 1869, the railway company executed and delivered its first mortgage to secure bonds of one thousand dollars each amounting to six millions, which were then and subsequently issued and sold before any work or material was furnished by either

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of the plaintiffs. Said mortgage was recorded in the several counties along the line of the road on the 26th day of May, 1869, and between that day and the 10th of October, 1869.

On November 1, 1871, the B., C. R. & M. Ry. Co. commenced the construction of the Milwaukee extension, and prior to January 22, 1872, expended thereon about fourteen thousand dollars. On the 22d of January, 1872, the railway company executed its mortgage on the Milwaukee extension to secure two million two hundred thousand dollars in bonds of one thousand dollars each, which were then and afterward issued and sold before work or material was furnished by either of the plaintiffs. Said mortgage was duly recorded in the several counties along the line of said extension between January 26 and February 1, 1872. The extension was completed about September, 1873.

In June, 1872, said railway company commenced the construction of the Pacific division, and on and prior to November 1, 1872, had expended thereon the sum of forty-three thousand dollars. On November 1, 1872, the railway company executed and delivered its mortgage upon said Pacific division, to secure one thousand eight hundred bonds of one thousand dollars each, which were then and subsequently sold before any work or material was furnished by either of the plaintiffs. This mortgage was duly recorded December 9, 1872. The division was completed about September, 1873.

The Muscatine division was fully graded, bridged and tied a distance of twenty-five miles from Muscatine to a junction with the main line prior to July 1, 1872, by a company other than the B., C. R. & M. Ry. Co., and then conveyed to the last named company, and on the day last named the said B., C. R. & M. Ry. Co. executed and delivered its mortgage upon the same to secure eight hundred bonds of one thousand dollars each, which was duly recorded in the several counties along the line of said road on July 1, 1872. Said Muscatine division was afterward extended to Riverside, Johnson county, and

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was completed in December, 1873, before any work was done or material furnished by either of the plaintiffs.

The main line is two hundred and eighteen miles in length; the Milwaukee extension ninety-four and eleven one-hundredths miles in length; the Pacific division is twenty-four and forty-one one-hundredths miles in length; the Muscatine division is thirty-one miles in length: making a total of track, exclusive of side track, of three hundred and sixty-seven and fifty-two one-hundredths miles.

On the 1st day of November, 1873, the B., C. R. & M. Ry. Co. made default in the payment of interest on the bonds issued under the mortgage upon the main line and the several branches, and soon afterward, upon the representations of said railway company, the bondholders funded the interest coupons upon the bonds of the main line and branches, for the term of eighteen months, and until May 1, 1875, and left said railway company in possession of said railway and all said branches, operating the same and receiving the rents and profits until the 19th day of May, 1875, when, upon application of the trustees of the bondholders, and upon bills filed for the foreclosure of the several mortgages, the United States Circuit Court for the District of Iowa appointed a receiver for said railway and branches, who on that day took possession of the same, and has since held possession and control thereof, with the income and profits, for the benefit of the bondholders.

At the October Term of said United States Circuit Court, for the year 1875, the bills filed for the foreclosure of each mortgage above mentioned upon the main line and the several branches were consolidated, and a decree was entered for the foreclosure of each of said mortgages for the full amount of the principal and interest of said bonds. On the 22d day of June, 1876, under the said decree of foreclosure, the main line and all the branches or divisions of said railroad were sold, and all were purchased by committees of their respective bondholders, and for the benefit of the old bondholders, and by

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them were conveyed to the defendant, the B., C. R. & N. Ry. Co., a new corporation organized by the bondholders of said main line, and branches or divisions. The entire main line and all the branches or divisions are now owned or operated by said new organization. The new organization has issued, in lieu of the old bonds on the main line and branches or divisions, a single series of new consolidated bonds upon the entire road, main line and all divisions, which every one of the bondholders (except about four hundred thousand dollars, whose *pro rata* share of the bids in their respective bonds has been deposited in gold according to the order of the court by the purchaser) have received, or are entitled to receive, as follows: On the main line, eighty per cent of the face of the old bonds in the new consolidated bonds; on the Milwaukee extension, fifty per cent of the face of the old bonds in the new consolidated bonds; on the Muscatine division, thirty per cent of the face of the old bonds in the new consolidated bonds; on the Pacific division, twenty-five per cent of the face of the old bonds in the new consolidated bonds.

An amount of stock in face value equal to the new bonds was issued to the new bondholders, and this stock constitutes the only stock of the new company, and stock and bonds in the new company have been sold to other parties than bondholders for purchase of iron or materials, and adjustment of disputed claims.

The main line and each of the branches were mortgaged for more than their full value respectively, and were sold for a small portion only of the amount found due upon the several mortgages. The said B., C. R. & M. Ry. Co. is now, and has been ever since the 1st day of November, 1873, wholly unable to pay the interest upon said bonds or its other debts, and insolvent.

On the 19th day of May, 1875, all the books, papers, records and accounts for construction and repairs of the said railroad and branches passed into the hands of W. W. Walker, provisional receiver, and afterwards, in July, 1875, passed

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into the hands of Gen. E. F. Winslow, permanent receiver, and so remained in his possession until the said railway and branches were sold on the 22d of June, 1876, when all the same passed into the hands of the defendant, the B., C. R. & N. Ry. Co., which ever since has had the same, and Gen. E. F. Winslow, the receiver, was elected vice-president and general manager of the B., C. R. & N. Ry., at its organization in June, 1876, and has so remained ever since. At all times since the possession of said books, records, accounts, etc., passed into the hands of said receiver, they have been open to the inspection of all stockholders of said B., C. R. & M. Ry. Co., and B., C. R. & N. Ry. Co. J. C. Brocksmit was the auditor of the B., C. R. & M. Ry. Co. during the years 1874 and 1875; was the auditor under both the receivers mentioned above; was made the auditor of the B., C. R. & N. Ry. Co. at its organization, and is such auditor now.

The B., C. R. & N. Ry. Co. was organized June 19, 1876, and its articles were recorded in Linn county on the 22d day of June, 1876, and on the 26th day of June, 1876, a deed of said railway, main line, and Milwaukee and Muscatine branches, was executed and delivered to said company by the several committees of bondholders, who purchased the same at the master's sale, and on June 22, 1876, a deed of said Pacific division was executed, which deeds were approved by the judge of the United States Circuit Court on the 20th day of July, 1876.

The bonds of the B., C. R. & M. Ry. Co. contain the following provision: "It is hereby expressly agreed by the said railway company, with each and every holder of this bond, that in case of the non-payment of any interest coupons hereto attached, if such default shall continue for six months after maturity and demand of payment, or in case of the non-payment of any installment required to be paid into the sinking fund, provided for by the said deed of trust, if such default shall continue for six months after such installment shall have become payable, then, and in either case, the prin-

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principal of this bond shall become due in the manner provided in the deed of trust, and the said company hereby expressly waives the benefit of every extension, stay or appraisement law which has been or may hereafter be enacted."

The mortgages contain the following provisions: "In case default shall be made in the payment of the interest coupons annexed to any of the foregoing bonds, according to the tenor thereof, or any payment required to be made into the sinking fund, as herein provided, and if such default shall continue for the period of six months, it shall be lawful for the party of the second part, by its duly authorized officer, agent or attorney, to enter into and upon all and singular the premises hereby conveyed, and each and every part thereof; and to have, hold and use the same under such superintendent, manager, receiver or agents as the party of the second part may select to conduct the business of said railroad and branches, and to exercise the franchise pertaining thereto, and to make from time to time all repairs, replacements, additions and improvements thereto, as may seem judicious, and to collect all earnings, dues, freights, incomes, rents, tolls, issues and profits of the same, and of every part thereof, and, after deducting the expenses of operating the said railroad, and of conducting the business thereof, and of the said repairs, replacements, additions and improvements, and of all taxes, assessments or liens upon the said premises, or any part thereof, to apply the money arising as aforesaid to the payment of interest coupons in the order in which they shall have become due, and thereafter to the payment of any installment or balance due, and payable to the sinking fund herein established; and, after paying all such past due coupons, and all installments or balances due to the sinking fund, to apply the same to the satisfaction of the principal of the aforesaid bonds which may be at that time unpaid, ratably and without discrimination or preference." The remaining facts are stated in connection with the consideration of the claims of the respective plaintiffs.

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The court found for the defendant. The plaintiffs appeal.

*Hubbard, Clark & Deacon*, for appellants.

*Grant & Grant*, for appellees.

DAY, J.—I. The facts respecting the claim of Christian Bear are as follows: On September, 1874, the plaintiff Bear, by agreement with the B., C. R. & M. Ry. Co., furnished 1. MECHANIC'S fencing material and built a fence along a portion of the line of the defendant's right of way for its railway in Linn county, of the value of eighty-one dollars and fifty cents. The account has been on file in the auditor's office of the B., C. R. & M. Ry. Co. and in the receiver's, and in the auditor's office of the B., C. R. & N. Ry. Co., since September 25, 1874. On the 25th of September, 1874, the B., C. R. & M. Ry. Co. gave plaintiff a note for said account, payable in twelve months after date, and ever since that day the book of said B., C. R. & M. Ry. Co., the receiver, and the B., C. R. & N. Ry. Co., in the auditor's office, known as the bills payable book, has shown the note so given. A copy of the entry on the bills payable book is as follows:

No.	Am't.	Date.	Time.			When Due.	Payable To.	Payable At.	Given on Acct.	When Paid.
			Yr.	Mo.	Day					
*	*	*	*	*	*	*	*	*	*	*
*	*	*	*	*	*	*	*	*	*	*
41	\$1.50	Sept. 25, 1874.	12			Sept. 25, 1875	Christian Bear.	U.S. Bank	Fencing	
*	*	*	*	*	*	*	*	*	*	*

On the 28th day of November, 1876, the plaintiff, Christian Bear, filed his statement for a mechanic's lien, and on the 30th day of November, 1876, he commenced this action:

1. The material was furnished and the labor was performed on the 25th day of September, 1874. The statement for a mechanic's lien was not filed until two years, two

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months and three days thereafter. Section 2137 of the Code provides: "Every person \* \* \* \* \* who wishes to avail himself of the provisions of this chapter may file with the clerk of the District Court of the county in which the building, erection or other improvement to be charged with the lien is situated, and within ninety days after all the things aforesaid shall have been furnished or the labor done, a just and true account of the demand due him after allowing all credits, and containing a correct description of the property to be charged with the lien, and verified by affidavit; but a failure to file the same within the time aforesaid shall not defeat the lien, except against purchasers or incumbrancers in good faith, without notice, whose rights accrued after the ninety days and before any claim for the lien was filed." As appears from the foregoing agreed statement of facts, the main line and all the branches were sold under the decree of foreclosure, and were purchased by committees of their respective bondholders for the benefit of the old bondholders, and were by them conveyed to the defendant, the B., C. R. & N. Ry. Co. This sale and purchase occurred after the expiration of ninety days from the accruing of plaintiff's claim, and before the statement for a lien was filed; so that, if either the old bondholders or the B., C. R. & N. Ry. Co. are to be regarded as purchasers in good faith, without notice, it is clear that the lien of plaintiff cannot be enforced. The question of the *bona fides* of the purchase of the B., C. R. & N. Ry. Co. can be most satisfactorily considered by noticing the objections urged by plaintiff to this company's being so treated.

2. It is urged by plaintiff that the B., C. R. & N. Ry. Co. had notice of plaintiff's claim, because the bills payable book, in possession of E. F. Winslow, the receiver, afterward, at the organization of the B., C. R. & N. Ry. Co., elected its vice-president and general manager, and in possession of J. C. Brooksmit, auditor of the B., C. R. & M. Ry. Co., and of the B., C. R. & N. Ry. Co., shows there was due plaintiff eighty-



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one dollars and fifty cents for fencing, payable September 25, 1875. We do not think that the mere fact that the books in possession of persons who afterward became officers of the new corporation showed that there was a claim due plaintiff for fencing is sufficient to charge that company with notice that plaintiff was entitled to a mechanic's lien. Besides, the agreed statement of facts shows that the main line and branches were bought by committees of the bondholders, for the benefit of the bondholders. It cannot, we think, be claimed that a mere entry of this kind upon the books of the old corporation was notice to the bondholders of plaintiff's claim, and that he was entitled to a lien. If the bondholders acquired the road discharged of plaintiff's lien, it follows, we think, that the new organization also holds it so discharged.

3. It is further claimed that the sale and purchase were not such a sale and *bona fide* purchase as contemplated by the statute. It is claimed that the title of the purchasers, the mortgagees, rises no higher than the mortgage, and that the lien of the mortgage was inferior to plaintiff's lien. We have held, however, that a judgment creditor, purchasing at a judicial sale, stands upon the same footing, and is entitled to the same protection, as any other purchaser. *Gower v. Doherty et al.*, 33 Iowa, 36.

4. It appears from the agreed statement of facts that in November, 1873, the B., C. R. & M. Ry. Co. made default in the payment of interest on its mortgage bonds, and that the bondholders funded their interest coupons for eighteen months, and allowed the railway company to remain in possession and appropriate the income of the road. Under the provisions of the bonds and mortgages it was competent for the bondholders to take possession of the road if default in the payment of interest should continue for six months after maturity and demand of payment. It is now claimed that the bondholders, in neglecting to take possession of the road and funding the interest, constituted the B., C. R. & M. Ry. Co. their trustee and agent to operate the road, and that they ought in equity

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to be estopped from objecting to valid claims for the legitimate operating and repair expenses. We are not authorized to infer, from any fact agreed upon, that the B., C. R. & M. Ry. Co. remained in possession of the road as the trustee or agent of the bondholders. If such trusteeship or agency existed, the B., C. R. & M. Ry. Co. would be obliged to account for the income and profits, but no such claim is anywhere asserted. We conclude that plaintiffs' lien cannot be enforced against the defendant, the B., C. R. & M. Ry. Co.

II. The facts respecting the claim of the plaintiffs O'Hanlan & O'Hara are as follows: During the months of September, October, November and December, 1874, in pursuance of a contract with the B., C. R. & M. Ry. Co., the plaintiffs O'Hanlan & O'Hara built for the said company the stone piers under the bridges on the main line of said road over the Iowa river, in Louisa county, and the west abutment and the second pier from the west end of the bridge of said railway company over the Cedar river, in Muscatine county, on the Muscatine division of said railway, where the same crosses the Cedar river. Upon the completion of work of the masonry on the bridge over the Iowa river, on or about December 1, 1874, vouchers were made out by said railway company, and approved for payment, in favor of plaintiffs for five thousand one hundred and twenty-eight dollars and fifty cents. On or about January 8, 1875, a voucher was made up and approved, in favor of plaintiffs, for abutment and pier under bridge over Cedar river for one thousand six hundred and one dollars and seventy-five cents. On or about January 8, 1875, an accounting was had, and seven promissory notes were given; the first for nine hundred and five dollars and fifty-two cents; each of the others for one thousand dollars. The first four notes were paid at maturity, and on the fifth two hundred and fifty dollars was paid after the receivership, leaving unpaid notes to the amount of two thousand seven hundred and fifty dollars and interest. The work was completed and the notes were given before the receiver was

2. ———: re-  
pairs: priority  
of mortgage.

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appointed. On November 4, 1875, the plaintiffs O'Hanlan & O'Hara filed in the counties of Louisa and Muscatine, where said piers and abutments were situated, statements for mechanics' liens on said bridge, piers and abutments. When the said bridges were originally built, in 1870 and 1871, on the main line, and in 1872 on the Muscatine division, they were erected on piles driven into the river bottoms, and wood work to hold ties and iron notched into the piles and laid upon them. When these piles decayed or became unsafe they were repaired and replaced with the stone work referred to in plaintiffs' petition. This way of erecting bridges on wooden piles instead of masonry is a common way of building railroads in all the western States.

1. Section 2130 of the Code is as follows: "Every mechanic or other person who shall do any labor upon, or furnish any materials, machinery, or fixtures for, any building, erection or other improvement upon land, including those engaged in the construction or repair of any work of internal improvement, by virtue of any contract with the owner, his agent, trustee, contractor or sub-contractor, upon complying with the provisions of this chapter, shall have for his labor done, or materials, machinery or fixtures furnished, a lien upon such building, erection or improvement, and upon the land belonging to such owner on which the same is situated, to secure the payment of such labor done, or materials, machinery or fixtures furnished." Section 2139 of the Code is as follows: "The liens for labor done, or things furnished, shall have priority in the order of the filing of the accounts thereof as aforesaid, and shall be preferred to all other liens and encumbrances which may be attached to or upon such building, erection or other improvement, and to the land on which the same is situated, or either of them, made subsequent to the commencement of said building, erection or other improvement." The mortgages, under a foreclosure of which the main line and the Muscatine branch in question were sold, were executed after the construction of the main line and the

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branch in question was commenced. Plaintiffs claim that under section 2139 they are entitled to a lien upon the entire line of railway, including the land, which shall have precedence of the lien of the mortgagees. In *Neilson v. The Iowa Eastern Railway Company et al.*, 44 Iowa, 71, it was held that the lien of a mechanic for work and material, furnished in the original construction of a railroad, has precedence over the lien of a mortgage executed prior to the furnishing of the work and materials, but after the construction of the road was commenced.

This case, however, involves a different principle, for, to use the language of appellants' counsel, "it will be observed that all the work was done and all the material was furnished by each of these plaintiffs after the roads upon which the lien is claimed were wholly completed. It now remains to be determined whether a railway is subject to a mechanic's lien for repairs which shall be superior and prior to a mortgage made after the commencement of the road, and before its completion. Unless this proposition can be maintained, the two last cases are at an end." It is clear that section 2130 gives a lien for repair of a work of internal improvement; but this section furnishes no rule for determining the priority between such a lien and an existing mortgage. In *Getchell & Tichenor v. Allen*, 34 Iowa, 559, where a mortgage existed upon a lot upon which was a building, it was held that the lien of a material man who furnished lumber, subsequently to the execution of the mortgage, which was used in the erection of a third story to the building, was junior and inferior to the lien of the mortgagee. It is claimed, however, that that case is not in point, because an entirely new part of the building was superadded, while in this case new piers and abutments were erected to supply the place of old ones which had decayed and become unsafe. Counsel for appellant, conceding that the case of *Getchell & Tichenor v. Allen* was decided correctly, insist that a different principle must be applied to the case at bar, because the work done by plaintiffs

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consists of repairs. It is clear, however, that the principle upon which that case is decided applies to repairs as well as to additions of the kind directly involved in that case. In that case it is said: "How is it when improvements in the nature of additions or repairs to the building are made after such mortgage? The mortgage binds the house; the improvements of the character indicated become a part of the house, and are, as it were, incorporated with it. After the improvements are made they do not remain separate and distinct from the building; they have lost their distinctive character; the house includes them; they are a part of the house, and, as such, are covered by the mortgage. For the reason that the mortgage binds the improvements as a part of the house, the mechanic's lien cannot defeat the mortgagee's right." It is clear that the decision of the court below establishing the lien of the material man upon the building paramount to the lien of Allen's mortgage was reversed upon the ground that the third story became incorporated into the building, as a part of it, and subject to the mortgage. And it is evident that the principle upon which that case was decided must have led to the same result if the material had been furnished for the construction of a new roof in place of one that had become worn out and decayed. This case was approved and the same principle was applied in *The Equitable Life Ins. Co. et al. v. Slye et al.*, 45 Iowa, 615; see also *O'Brien v. Pettis*, 42 Iowa, 293. We feel satisfied that the plaintiffs are not entitled to a lien paramount to the mortgage.

2. Appellants insist that if they are denied a general lien upon the entire line of railroad, including the land, under 3. \_\_\_\_: \_\_\_\_: section 2139, they are entitled to a lien upon the \_\_\_\_: \_\_\_\_: superstructure of the railway, its road-bed, ties, track, bridges, etc., under section 2141 of the Code, with the right to tear down and remove the piers and abutments by them erected. This section is identical with section 1855 of the Revision, and is as follows: "The lien for the things aforesaid, or work, shall attach to the buildings, erections or

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improvements for which they were furnished or done, in preference to any prior lien or incumbrance, or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien may have such building, erection or other improvement sold under execution, and the purchaser may remove the same within a reasonable time."

In *Getchell & Tichenor v. Allen* it was held that this section does not apply where improvements enter into and form a part of a building covered by a mortgage.

In *O'Brien v. Pettis*, 42 Iowa, 293, it was in effect held that the right to a lien under this section depends upon the question whether the improvement for which the lien is claimed is so far an independent structure as to be capable of removal without materially injuring what would remain. In this case the stone piers were constituted in the place of wooden piles covered by the mortgage. When so placed in the road they became a part of it, as the third story in the case of *Getchell v. Allen* became a part of the building, and the mortgage attached to them. They cannot, we think, be removed, nor can plaintiffs' lien be enforced under section 2141.

III. The lien of the plaintiffs, Higley & Bro., was filed November 5, 1875, and is for various articles of hardware furnished the B., C. R. & M. Ry. Co., from the 2d of January to the 17th day of May, 1875, to be used in the repair of its lines of railway, amounting in all to nine hundred and fifty dollars and three cents. The disposition made of the claim of O'Hanlan & O'Hara is decisive of the claim of these plaintiffs.

The judgment is

**AFFIRMED.**

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Doud v. Waller.

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## DOUD v. WALLER.

1. **Surety: PARTIAL PAYMENT.** Where a party became surety for one-third of a debt, and another party became surety for two-thirds thereof, a part of which was subsequently discharged by the payment of a portion of a judgment recovered thereon, *held*, that neither of the sureties could insist upon the application of the entire amount paid to the release of his liability.
2. ———: ———: **PROPORTION OF LIABILITY.** The amount so recovered and paid should be deducted from the entire debt, whereupon the sureties would be liable for the remainder, in the proportion of their liability upon the original debt.

*Appeal from Dubuque Circuit Court.*

TUESDAY, JUNE 11.

THE plaintiff filed his substituted petition, alleging:

"1. That on or about the 14th day of February, 1867, Mathias Ham executed and delivered to Margaret McKenzie his promissory note for the sum of three thousand dollars, and on or about the time aforesaid she sold and transferred the same to said defendant, together with a mortgage given to her to secure the same by said Ham and wife, at the time aforesaid, on the following described property: \* \* \* \*

"2. That afterward, to-wit: August 29, 1867, said plaintiff guaranteed the payment of one-third part of said note, whereby he became and was surety on said note for the payment of one-third part of the same.

"3. That after the maturity of said note said defendant herein brought a foreclosure suit in equity on said note and mortgage, in the District Court for Dubuque county, Iowa, and at the June Term, 1871, recovered judgment against said Mathias Ham for the sum of four thousand three hundred and twelve dollars and fifty cents, and costs of suit, and against this plaintiff, on said guaranty, for the sum of one thousand

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four hundred and thirty-seven dollars and fifty cents, of said sum of four thousand three hundred and twelve dollars and fifty cents, as surety, to be at interest at the rate of ten per cent per annum, and a decree of foreclosure of said mortgage, and for special execution on said judgment for the sale of said mortgaged premises.

"4. That afterward, to-wit: August 12, 1871, the said defendant caused special execution to be issued on said judgment, and said premises were sold under and by virtue of the same on the 19th day of September, 1871, for the sum of three thousand and twenty-five dollars, which amount was credited and applied on the judgment.

"5. Plaintiff further states that said Mathias Ham was the maker and principal of said note, and that the undertaking and agreement of plaintiff aforesaid were secondary thereto, and as surety for said Ham for the payment of one-third of said note; that said judgment was rendered against this plaintiff as surety for said Ham for one-third only; that the sum of three thousand and twenty-five dollars has been paid on the said judgment of four thousand three hundred and twelve dollars and fifty cents by said Ham, rendered against him as principal, by the sale of the property as aforesaid, which more than pays the sum of one thousand four hundred and thirty-seven dollars and fifty cents, for which judgment was rendered against plaintiff as surety, whereby the said plaintiff was released and discharged from all liability on the same, and the said judgment as to him became and was satisfied.

"6. And plaintiff further says that, notwithstanding the facts aforesaid, the said Maria Waller refuses to enter satisfaction of said judgment against him, or any part thereof, but pretends and claims that the same is unpaid and subsisting.

"7. A copy of said note and guaranty is hereto attached, and marked exhibit 'A,' and of said judgment marked exhibit 'B,' and made part hereof.



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"8. Therefore plaintiff prays that the said defendant, Maria Waller, may be decreed to enter full and complete satisfaction of said judgment and decree, so far as the same affects your petitioner, and to release and discharge the judgment upon the proper records so far as your petitioner is concerned, the same to be done within a time to be fixed by this court; and in case said defendant fails to obey said decree, then that such satisfaction and release be entered by the clerk of the court, and plaintiff prays for such other and further relief as may be just and equitable."

The guaranty upon the note is as follows: "I hereby guarantee the payment of the one-third of the within note; demand, notice and protest waived, August 29, 1867."

The portion of the judgment material to this inquiry is as follows: "The court finds that there is due to said plaintiff from Mathias Ham, upon the note described in said petition, the sum of four thousand three hundred and twelve dollars and fifty cents; that there is due said plaintiff on said note from Margaret McKenzie the sum of twenty-eight hundred and seventy-five dollars; and that there is due said plaintiff on said note from said John Doud, Jr., the sum of fourteen hundred and thirty-seven dollars and fifty cents. It is, therefore, ordered, adjudged and decreed by the court that the plaintiff have and recover of and from the defendant, Mathias Ham, the sum of four thousand three hundred and twelve dollars and fifty cents, and costs of suit; and from the defendant Margaret McKenzie, as indorser, for the sum of two thousand eight hundred and seventy-five dollars of the sum of four thousand three hundred and twelve dollars and fifty cents, and costs of suit; and from the defendant John Doud, Jr., the sum of one thousand four hundred and thirty-seven dollars and fifty cents of the said sum of four thousand three hundred and twelve dollars and fifty cents; for which sum judgment is hereby rendered against said defendants. And it is further ordered and decreed by the court that the mortgage described in plaintiff's petition be and is hereby fore-

## Doud v. Waller.

closed; that special execution issue on said judgment for the sale of said premises; \* \* \* \* that said premises, or so much thereof as may be necessary, be sold to satisfy said judgment; that general execution (issue) for any balance remaining unsatisfied or unpaid against said Mathias Ham, Margaret McKenzie, and John Doud, Jr., as their liability respectively appears."

To the petition the defendant demurred as follows:

"1. The facts stated in the petition do not entitle the plaintiff to the relief demanded.

"2. The facts stated in the petition defeat the alleged cause of action in this—*First*, it appears that the matters and things complained of herein have once been adjudicated; *second*, it appears by the petition that a judgment has been rendered against plaintiff, and the facts stated show that the judgment so rendered, as alleged, has never been paid, nor is it averred that said judgment has been paid."

The court sustained this demurrer, and rendered judgment against plaintiff for costs. The plaintiff appeals.

*A. Cragin*, for appellant.

*Pollock & Shields*, for appellee.

DAY, J.—I. The rights of the parties are fixed by the judgment rendered in the case of *Waller v. Ham et al.* It is plain from the judgment rendered in that case that it was the

1. SURETY: intention to make Margaret McKenzie conditionally liable for two-thirds of the judgment rendered against Ham and John Doud conditionally liable for one-third of the judgment against Ham. In other words, in the event of the failure to collect the judgment from Ham, the whole of it should be collected from McKenzie and Doud, McKenzie paying two-thirds, and Doud one-third. The plaintiff has no more right to insist that the three thousand and twenty-five dollars collected upon the judgment shall be applied in full discharge of his conditional liability, than Margaret McKenzie has to de-

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mand that it shall be applied in full discharge of her conditional liability. If both are discharged, it follows that one-third of the judgment against Ham is without any security. The amount collected should be applied upon the judgments against McKenzie and plaintiff in proportion to their respective liability.

II. Appellant claims that plaintiff, at the most, cannot be held liable for more than one-third of what remains 2. —: —: unpaid, and that the court below should have so <sup>proportion of</sup> <sub>liability.</sub> held. It is true, as we have before seen, that plaintiff can be held liable only for one-third of what remains unpaid. The only question is whether the plaintiff is entitled to any relief in this action. The petition is drawn upon the theory that the whole judgment has been discharged, and that Maria Waller refused to enter satisfaction. If defendant had been asked to credit the judgment with one-third part of the amount collected *non constat* she would have refused to do so. She ought not to be required to incur the expenses of a litigation unless she has refused the plaintiff what he is entitled to. Further, it does not appear that this relief was claimed in the court below. If the attention of the court had been called to this feature of the case, probably the relief, to this extent, would have been granted without incurring the expenses of an appeal. It seems most probable that the claim for this qualified relief was made for the first time in this court. Still, under the petition, the plaintiff is entitled to the relief asked for, or any lower degree included therein. Code, § 2729. The plaintiff, failing to make a case entitling him to the satisfaction of the entire judgment, would be entitled to a satisfaction of so much of it as has been discharged. The cause will be reversed, with directions to the court below to overrule the demurrer, and, if no answer is filed, to enter a decree that the defendant credit upon the judgment against plaintiff one-third part of the amount collected. Inasmuch as it is not averred that defendant ever refused to make such a credit, and does not appear that the

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Marlow v. Marlow.

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plaintiff might not have had this relief in the court below, if the attention of the court had been directed to it, the plaintiff must pay the costs both in the court below and in this court.

REVERSED.

Mr. Justice ADAMS took no part in the decision of this case.

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MARLOW V. MARLOW.

1. **Administrator; ORDER TO PAY CLAIM.** An order by the court to an administrator to pay a claim duly sworn to and filed is sufficient to indicate that the claim is approved by the court, even when it has not been formally proved up.

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*Appeal from Winneshiek Circuit Court.*

TUESDAY, JUNE 11.

THE appellant, E. G. Marlow, is the son of John Marlow, deceased, and heir to his estate. William Marlow is the administrator, and has filed his final report. The appellant contests two items in the report. These items, one for six hundred and seventy-five dollars and one for seven hundred and eighty-five dollars, are entered in the report as credits to the administrator for money paid by him on the indebtedness of the estate to one James Marlow. The indebtedness arose, as the administrator claims, by reason of James Marlow paying a note made by him and the decedent jointly, but upon which note James Marlow was merely surety. The appellant claims that there is no sufficient evidence that James Marlow was merely surety, and no sufficient evidence of the payment, and that if he paid it there is no sufficient evidence that his claim was proved up against the estate, or admitted. He also contends that the claim was barred, or, at most, belonged to the fourth class. All these objections were overruled, and the report approved. The contestant appeals.

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Marlow v. Marlow.

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*L. Bullis*, for appellant.

*C. P. Brown*, for appellee.

ADAMS, J.—The evidence that James Marlow was merely surety may be found in the testimony of William Marlow. He says that the note was given in part payment for the homestead of intestate. Being given for the intestate's benefit, the fair inference is that the intestate was principal and James Marlow was surety.

The evidence of payment may be found in the testimony of James Marlow. He says: "I paid the face of the note at bank." This was not a transaction between him and decedent.

The claim was not proved up, but it was duly sworn to and filed April 11, 1867. As to whether it was admitted with the approbation of the court is a question upon which there is some doubt. At the time the claim was sworn to and filed the administrator had in his hands six hundred and seventy-five dollars belonging to the estate, and he says that he informed the county judge that he had that amount that he could pay on the claim, and that the judge told him to apply it and stop interest, and he did apply it. The judge was examined as a witness and contradicts the statement. If William Marlow's statement is correct, we think that the claim was admitted by the administrator with the approbation of the court. The court below must have found the fact to be as stated by William Marlow, and we could not properly disturb the finding.

Notice was first published September 27, 1866. The claim was filed and admitted April 11, 1867, a little more than six months after first publication. The contestant claims that the six months within which claims of the third class can be filed commences to run from the first publication. But whether the claim belongs to the third or fourth class is not a question which concerns the heirs, and it is only as heir that the contestant is interested in the estate.

**AFFIRMED.**

## PHELPS V. THOMPSON ET AL.

1. **Administrator; CLAIM AFTER FINAL SETTLEMENT.** Where a party having a claim against the estate of a deceased person presented the same to the administrator, but never formally filed it, and gave it no further attention until eight years afterward, when he commenced an action therefor against the administrator and heirs, it was *held* that he was not entitled to the relief sought.

*Appeal from Winneshiek District Court.*

TUESDAY, JUNE 11.

HOLVER H. LEA died in the year 1868, intestate. The defendant John Thompson was appointed administrator of his estate on the 28th day of February, 1868.

On the 11th day of April, 1868, the plaintiff filed with the county judge an account and certain promissory notes, as a claim against the estate of decedent, in accordance with the statute in such cases made and provided.

On the 8th day of January, 1870, said administrator filed a petition for the sale of the real estate of the decedent to pay the debts, and in his schedule of debts accompanying said petition the claim of the plaintiff was set forth as proved and unpaid.

Commissioners were appointed to appraise the real estate and set apart a homestead to the widow. This having been done, the real estate not included in the homestead was ordered to be sold.

On the 9th day of January, 1871, said administrator filed an affidavit setting forth that he could not make a sale of said real estate at its appraised value, whereupon the court ordered that the same be sold at public or private sale, at a price not less than two-thirds of the appraised value. In pursuance of said order the said real estate was sold and conveyed on the 4th day of October, 1872.

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On the 28th day of March, 1874, said administrator filed his final report, in which, among other things, it was set forth that the claim of the plaintiff was filed against the estate, but was never "allowed by this administrator, nor proved up in said court, as the law directs."

On the 7th day of September thereafter, an order was entered approving said final report, and discharging said administrator upon his filing receipts for the distributive shares, as shown by the report. These shares were afterward paid by the administrator to the heirs.

On the 6th day of April, 1876, plaintiff commenced this action against the administrator, the widow and heirs, and the purchasers of said real estate, in which he avers that his claim against said estate was allowed by the administrator and approved by the court; that no notice of said final report, or of the filing thereof, was served upon plaintiff, and that plaintiff had no knowledge thereof until some six months after the final order was made by the Circuit Court; that in the year 1873 said administrator assured plaintiff that his claim had been duly allowed, and would be paid; that, relying on said statements and assurances, plaintiff made no further "provision relative to said claim;" that said administrator made no effort to sell said real estate at its appraised value, and that he fraudulently refused to accept offers for the same in excess of said value, and made application to the court to sell at less than the appraisement, for the purpose of defrauding the plaintiff; that after having averred in the petition for the sale of the lands that the claim of plaintiff was proved and unpaid, he fraudulently averred in his final report that said claim was not proved.

Judgment was prayed against the administrator and the heirs for the amount of plaintiff's claim.

Defendants, by their answer, denied all fraud, and averred that notice of the filing of the final report was duly served upon the plaintiff, and that plaintiff was negligent in not

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looking after his interests, and is not now entitled to any relief.

There was a trial by the court, and judgment entered for the defendants for costs. Plaintiff appeals.

*Adams & Bullis*, for appellant.

*O. J. Clark*, for appellees.

ROTHROCK, CH. J.—It is conceded that the claim of the plaintiff never was formally proved and allowed. The records of the court make no mention of any action having been taken by the plaintiff further than the filing of the claim. In the petition for the sale of the land the claim was set forth as “proved and unpaid,” but the evidence shows beyond question that this was a mistake of the person who prepared the petition. It does not appear that plaintiff was misled by this recital, nor that it in any manner influenced him in the prosecution of his claim. All that plaintiff did, as shown by the record, was to file his claim, April 11, 1868.

So far as the record shows he gave no further attention to it until the commencement of this action, eight years afterward.

The following stipulation was entered into by the parties in the court below:

“That a notice of said final report was served on one L. Bullis, the general attorney of plaintiff, in June, 1874, and that about the 1st of January, 1874, said Phelps, plaintiff, left the county of Winneshiek, State of Iowa, for Europe, and was absent from said county till after the order of discharge of the administrator, set out in plaintiff’s petition, and that during such absence said L. Bullis had these claims against the estate of said Lea in his possession, under his control as such attorney, for collection.”

Under these circumstances we think the plaintiff is prop-



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erly chargeable with negligence in failing to prosecute his claim.

In regard to the charges of fraud against the administrator we have to say that we believe the evidence shows that he acted in entire good faith, and with no intent to wrong any one.

We do not review the authorities cited by counsel for appellant. An examination of them will show in cases where relief has been granted, after a final settlement, to parties holding claims against an estate, the equities were much stronger than in the case at bar.

**AFFIRMED.**

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**EDGERLY V. THE FARMERS' INSURANCE COMPANY.**

1. **Insurance; WAIVER OF PRELIMINARY PROOF: EVIDENCE.** The assured having testified that he delivered to the adjusting agent of the company a paper containing a notice and estimate of his loss, and was told it was sufficient, and another witness having testified that the agent, upon being asked if any further notice or anything was required, answered there was not, it was *held* that a waiver of further preliminary proof might be inferred.
2. ——— : ——— : **AGENT.** The policy stipulating that the preliminary proof should be delivered at the office of the company, a delivery to any officer in charge of the office was sufficient, and such officer was authorized to waive any further proof than that submitted.
3. ——— : ——— : **EVIDENCE.** The paper delivered to the agent as preliminary proof was admissible only to establish the waiver, and not as evidence of the extent of plaintiff's damage.
4. ——— : ——— : **INSTRUCTION.** The submission to the jury of the question of waiver of preliminary proof was not erroneous, under an averment that the paper served was accepted as preliminary proof.

*Appeal from Linn District Court.*

**TUESDAY, JUNE 11.**

**Action upon a policy of insurance against damage by light-**

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ning. The defendant claims that the damage in question was not caused by lightning, but by a tornado. As to what the cause of the damage was the evidence is such as to leave the question in great doubt. But the company sets up other defenses. One of the conditions of the policy is that in case of loss the assured shall, within thirty days, deliver at the office of the company in Cedar Rapids a particular account of the loss, signed and sworn to by the assured. This condition of the policy was not complied with. In the petition as originally drawn there was no averment that it had been, nor that the proofs of loss were waived. A recovery, however, was had, and upon appeal to this court the case was reversed. 43 Iowa, 587. Before the trial from which this appeal was taken an averment was added to the petition, by amendment, that the preliminary proofs were waived. This the company denies, and one of the principal questions in the case is as to whether they were waived or not. The facts relied upon to show a waiver, and which, under the evidence, the jury was justified in finding to be true, are as follows: The plaintiff within the thirty days delivered at the office of the company in Cedar Rapids a notice of loss and a paper, which is in these words:

"We, William M. Sawyer, Calvin R. Read and W. J. Beeks, of Linn county, Iowa, do under oath say that we verily believe that G. C. Edgerly's frame barn was struck by lightning on the 8th day of June, 1874, and that the damage to said barn is four thousand five hundred dollars: two horses, one hundred and eighty dollars; grain and hay, one hundred and fifty dollars; farm implements, twenty-five dollars; that we have fairly and impartially assessed the damages on said property, and we are in no manner interested in said property.

"WM. M. SAWYER,

"C. R. READ,

"W. J. BEEKS."

This statement was sworn to by the subscribers before a justice of the peace. There was also appended a certificate

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of the justice of the peace to the effect that he was the nearest magistrate; that he was not related to the assured, nor concerned in the loss; that he had made a personal examination of the premises and of the circumstances of the loss, and knows of his personal knowledge of the same, and believes that the loss had been sustained by the assured without fraud or evil practice on his part. These papers, including the sworn statement above set out, were delivered to one Bennett, a special and adjusting agent of the company, accustomed to receive notices of loss, and occupying the home office of the company at Cedar Rapids. The plaintiff asked Bennett, according to his own testimony, if he required any more notice, and Bennett said it was sufficient and he would come up and see about it. According to the testimony of one Akers, plaintiff asked Bennett if any further notice or *anything* was required, and he said there was not. Bennett expressed some doubt as to whether the damage was not done by wind, and said if it was they would not pay, but if it was done by lightning they would. It does not appear that any paper was spoken of by either party as proof of loss. The premises were examined by Bennett. Other facts are stated in the opinion. There was a trial by jury, and verdict for plaintiff. Defendant appeals.

*I. M. Preston & Son*, for appellant.

*Young, Thompson & Davis*, for appellees.

ADAMS, J.—I. If nothing but the notice of loss had been delivered to Bennett, and he had been asked if it was sufficient, and in reply he said that it was, that

1. INSURANCE: waiver of preliminary proof: evidence.

could not be considered as a waiver of preliminary proof. *Desilver v. State Mut. Ins. Co.*, 38 Penn. St., 130. Bennett, in such case, might well have supposed that the plaintiff intended to deliver some other paper as preliminary proof, and only claimed for the paper delivered that it was a notice of loss. But something besides the notice was delivered, and that something was evidently

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enough an attempt, however feeble, to make preliminary proof. Now, if Bennett was asked, as Akers says he was, if *anything* further was required, and he said there was not, we think that constituted a waiver of preliminary proof so far as Bennett had power to bind the company in that respect. It is contended, however, that we must take the plaintiff's testimony alone as to what was said, and throw out Akers', and that, taking his alone, it would appear that he inquired only if the notice was sufficient. The plaintiff appears upon his examination and cross-examination to have been considerably confused. It is by no means certain that he had any definite idea of the difference between notice and preliminary proof, or of what was required in the matter. If so, not much reliance can be placed upon his memory as to the precise language used. He might have inquired if any further notice or anything was required, just as Akers says he did, and have forgotten that he used the word *anything*. He does not say that he did not use it. Now Akers was the justice of the peace who administered the oath to the persons who made the sworn statement, and the justice who made the certificate as nearest magistrate. He went along with the plaintiff to the company's office to see the business transacted. Having participated in making the paper, which was something besides notice, and being interested, as we may presume, to know whether that paper was sufficient, his testimony is entitled to weight, and we should not be justified in holding that it should not be considered where it goes further than the plaintiff's.

II. Upon this point there only remains to be determined whether Bennett had power to make a valid waiver. It is not  
 2. —: —: probable that any agent or officer of the company  
     agent. was expressly authorized to do it. If, however, it had been provided in the policy that the preliminary proof should be delivered to any particular person, doubtless such person would have had authority to examine whatever was delivered as preliminary proof, and waive any defects which

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he might discover therein. But in this policy it is provided only that it should be delivered at the office of the company in Cedar Rapids. Under such provision we think that a delivery to any officer or agent of the company at the office, and apparently in charge of it, would be sufficient. That the delivery in this case was made to the proper person we have no doubt. He was one of the occupants of the office, and the company's adjusting agent. He was accustomed to receive notices of loss, and to act upon the notices by proceeding to make an examination. If Bennett was authorized to receive the preliminary proof, we think his waiver of any defect therein would bind the company, unless his authority in that respect was expressly limited, and the plaintiff had notice of such fact.

III. The paper delivered to Bennett, as preliminary proof  
3. —: —: of loss, was admitted in evidence, against the  
evidence. defendant's objection. As a part of the evidence  
of waiver it was admissible. It was not evidence of the  
extent of the plaintiff's damage. If the defendant apprehended that the jury might so consider it, it should have asked an instruction limiting the effect of the paper as evidence.

IV. The defendant asked the court to give an instruction which is in these words: "You are instructed that it is incumbent upon the plaintiff to prove what interest he had in the property at the time of the loss, and whether there was any other insurance on the property, whether the property was incumbered, and the extent thereof, and that the plaintiff has complied with the conditions named in the policy to be performed upon his part; otherwise you will find for the defendant." The court refused the instruction, and the refusal is assigned as error.

It was necessary for the plaintiff to prove that he had sustained damage as alleged, and the jury was virtually so instructed in the tenth instruction. There is no warranty in the policy that no other insurance had been or would be effected upon the property, and no warranty that the property

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Edgerly v. The Farmers' Insurance Company.

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was not incumbered. It was not incumbent, therefore, upon the plaintiff to prove that there was no other insurance and no incumbrance upon the property. There was, it is true, one condition to be performed unless waived—the making of the preliminary proof—and upon this the jury was fully instructed.

V. The defendant complains of an instruction given, which was to the effect that if the plaintiff had sustained loss as alleged, and served upon the company notice of the loss, and a particular account of the loss, containing all the information required by the terms of the policy, etc., the plaintiff would be entitled to recover. It is urged by defendant that there is neither averment nor evidence that preliminary proof was made as required by the policy, and that the jury should not have been instructed upon the supposition that they might so find. We are inclined to think that this instruction should not have been given, but the error was without prejudice, because the jury found specially that the preliminary proof was waived.

VI. The defendant complains of the fifth instruction, 4. \_\_\_\_: which submits to the jury the question of waiver <sup>instruction.</sup> of preliminary proof. This instruction is assailed upon the ground that the petition contains no averment that preliminary proof was waived. It avers, however, that the paper served was accepted as proof. That certainly is a waiver of any other proof.

VII. The defendant complains of the seventh instruction, upon the ground that it assumes a fact not proven, to-wit: that plaintiff went to the office of the company and inquired for the proper person with whom to transact his business, and was referred by the clerks to Bennett. This is not precisely in accordance with the evidence. The evidence shows that plaintiff, upon going in, inquired for Bennett, who was not in, and was told that he would soon be in. But, according to the view which we have taken of the case, Bennett's authority did not depend upon any such fact as was supposed

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in the instruction, but upon facts which he himself testified to, and which are undisputed.

VIII. The defendant complains that the verdict is contrary to the evidence, but it is not so clearly so as to justify our interference.

Some other errors are assigned, but we think that they are covered by the views which we have expressed.

**AFFIRMED.**

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THE STATE V. DOERING.

1. **Criminal Law:** ASSAULT WITH INTENT TO COMMIT MURDER. Facts considered under which it was held that the term of imprisonment of a person convicted of assault with intent to commit murder should be reduced from four years to two years and six months.

*Appeal from Dubuque District Court.*

TUESDAY, JUNE 11.

INDICTMENT for an assault with intent to commit murder. Verdict of guilty; judgment, and defendant appeals.

*Pollock & Shields*, for appellant.

*J. F. McJunkin*, Attorney General, for the State.

SEEVERS, J.—The assault was committed in November, 1874, and the trial took place in December, 1875. The defendant was sentenced to imprisonment at hard labor for the period of four years.

So far as can be discovered from the testimony there was no enmity existing between the defendant and Ginter, the party injured. The latter was the owner of a blacksmith and wagon making or repair shop. The former was leased to other parties, and was not in possession of Ginter. They

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The State v. Doering.

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were in the same building, and there was a doorway connection between them. In the morning of the day the assault was committed Ginter was in the wagon shop, when the defendant entered the blacksmith shop. He was intoxicated, and commenced talking to parties in the shop, and used abusive language toward Ginter, which the latter heard. The defendant, previous to this, had worked for Ginter, and he passed into the wagon shop and demanded a settlement. Whether there was any difficulty in relation thereto is not clear, but certain it is they from some cause used violent and abusive language toward each other. Finally the defendant passed into the smith shop, and Ginter either went with him or followed him very shortly thereafter. They got into a scuffle, blows and kicks were interchanged, but which made the first demonstration in this direction does not appear.

However this difficulty occurred it was not regarded as serious by the persons present, and they voluntarily separated and Ginter went back into his own shop. The defendant continued to abuse Ginter, and the latter passed into the smith shop for some purpose, and said to defendant that he must stop abusing him or go out of the shop, and put his hands on the defendant and gave him a shove, whereupon the latter, as quickly as could be done, picked up a piece of iron near at hand and struck the blow, and Ginter was quite seriously injured. One witness testified that defendant said at the time Ginter shoved him that he had been struck with a hammer. But no one saw the hammer, and we do not think any was used. When intoxicated, and he got so at times, the defendant was irritable and easily excited. This was known to Ginter and others.

The latter testified that defendant worked for him some three or four years, and he had observed peculiarities in his conversation and conduct. At times he was "strange." "I thought he was not well minded—that he was not as well as anybody else. I got along all right with him;" and, after speaking of certain peculiarities he had observed in defend-



## Schmid v. Humphrey.

ant's conduct, in answer to a question as to his sanity testified: "I thought he was not exactly as sound as others—as I do my neighbors."

It is doubtful whether we would be justified in setting aside the verdict as being against the evidence, and again put defendant on trial for this offense. Indeed, it would be perhaps unjust to do so after he has been imprisoned for more than two years.

Taking all the circumstances together we think the punishment inflicted is excessive, and it therefore should be reduced. This we have the power to do, and the term of imprisonment is fixed at two years and six months from the 13th day of December, 1875, and the judgment of the District Court will be modified accordingly.

MODIFIED AND AFFIRMED.

## SCHMID V. HUMPHREY.

1. **Damages: FRIGHTENING HORSE: WORK ON SUNDAY.** In an action for damages for injuries sustained by the plaintiff as the result of the frightening of his horse in the highway by the defendant's dogs, it was *held* that plaintiff's right to recover was not affected by the fact that the accident occurred on Sunday, while he was riding on a business errand.
2. ———: ———. It was not essential to plaintiff's right to recover that the dogs should have bitten the horse, but it was sufficient if they ran after and barked at him.

*Appeal from Fayette Circuit Court.*

TUESDAY, JUNE 11.

THIS action was brought to recover damages for injuries received by plaintiff while traveling on a highway, by reason of the defendant's dogs scaring a horse attached to a buggy in which the plaintiff was riding, and the plaintiff, being

48	652
93	81
48	652
95	743
48	652
100	559
48	652
110	225
48	652
116	641
116	644
48	652
123	152
48	652
131	615

## Schmid v. Humphrey.

frightened by the running and kicking of the horse, jumped from the buggy and was greatly injured.

In addition to a general denial the defendant pleaded that "plaintiff was, while riding, \* \* \* at said time unlawfully engaged in labor on the Sabbath, and that said labor was not of necessity or charity."

There was a jury trial, verdict and judgment for the plaintiff, and defendant appeals.

*J. W. Rogers & Son and Samuel Murdock*, for appellant.

*Rickel & Clements*, for appellee.

SEEVERS, J.—I. The court instructed the jury as follows: "If you find the plaintiff otherwise entitled to recover you are instructed that the fact the accident occurred on Sunday, while the plaintiff was riding on a business errand, will not defeat his right to recover."

1. DAMAGES:  
frightening  
horse: work  
on Sunday.

The statute provides: "If any person be found on the first day of the week, commonly called Sabbath, engaged in any riot, fighting, or offering to fight, or hunting, shooting, carrying fire-arms, fishing, horse-racing, dancing, or in any manner disturbing any worshipping assembly or private family, or in buying or selling property of any kind, or in any labor, the work of necessity or charity only excepted, every person so offending shall be punished." Code, § 4072. Conceding the plaintiff was engaged in labor, does it therefore follow he cannot recover?

He is not seeking to enforce any contract which is prohibited by law, nor is he seeking to enforce any right obtained by the breach of any law. Suppose it be said the plaintiff was doing something prohibited by law, but which in no manner concerned the defendant, or disturbed him in any of his rights or privileges, will it do in such a case to say that the plaintiff is no longer under the protection of the law, and that the defendant may with impunity, by the use of positive force or through negligence, do him an injury, and that no civil liability

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Schmid v. Humphrey.

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is incurred thereby? Can the defendant be permitted to set up as a defense the fact that the plaintiff was doing something prohibited by law which did not in fact directly contribute to the injury? We think not. We are not aware there is any distinction between an act committed, by which a wrong is perpetrated, and the omission to do something by reason of which the same result is reached. Therefore, if one is knocked down and robbed on the Sabbath, can the thought be entertained for a moment that the wrong-doer would not be civilly liable? His punishment, criminally, does not afford the injured party any redress.

It has been held that a trespasser may recover damages from one who sets spring guns on his premises in a negligent manner, whereby the trespasser is injured. *Bird v. Holbrook*, 4 Bing., 624; *Hooker v. Miller*, 37 Iowa, 613. And so may one who, while trespassing on the lands of another, is bitten by dogs. *Loomis v. Terry*, 17 Wend., 496. The fact that a person is a trespasser does not constitute him an outlaw, and warrant another in negligently or wantonly injuring him. For the trespass or wrong, whatever it may be, the wrong-doer is answerable to the offended law; but his rights as to other persons, and as to other transactions, cannot be affected by that circumstance. A person may be traveling when he has no right to, or in a way prohibited by law, or without the payment of toll when it may be lawfully demanded, or at a rate of speed forbidden by law, or on the wrong side of the road, or may have left his team standing in a street without keeping it under his command as the law may require, and in none of these cases does his right of action for an injury sustained by the negligent act of another depend on any of these circumstances, unless what he may have done *directly* contributed to the injury sustained. *Gates v. The B., C. R. & M. R. Co.*, 39 Iowa, 45.

The fact that the plaintiff was at the place at the time he was injured did not directly contribute thereto. As well might it be said if he had never come to Iowa, or been born,

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Schmid v. Humphrey.

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he would not have been injured, and that, therefore, by reason of such facts he contributed to the injury. If one knocks another down and senseless, and while in that condition and two hours afterward he is robbed by another, the latter act could hardly be considered the proximate result of the former. So, here, the proximate cause of the injury was not because of the fact the plaintiff was quietly and peaceably passing along the highway. The attack made on him was not the legitimate result of his being in the highway at that time and place. If, on the contrary, he had been racing or hallooing, or making any noise or disturbance likely to attract attention, or invite attack by the dogs, a different question would be presented.

In Massachusetts, New York, and other States, traveling on the Sabbath is expressly prohibited, and in the former State it has been held that a person who travels on business or for pleasure cannot recover of a street railway company for injuries received in consequence of the negligence of the company while so traveling in their cars. *Stanton v. Metropolitan R. Co.*, 14 Allen, 485. The contrary doctrine is held in New York. *Carroll v. Staten Island R. Co.*, 58 N. Y., 126. In the former State it was held in *Gregg v. Wyman*, 4 Cush., 322, that the owner of a horse who let it on the Lord's day, to be driven for pleasure to a particular place, could not maintain an action of tort against the hirer for driving it to a different place, and in so doing injuring it.

This doctrine is repudiated in *Woodman v. Hubbard*, 25 N. H. (5 Foster), 67, and *Morton v. Gloster*, 46 Maine, 420, and it has been abandoned in Massachusetts, and *Gregg v. Wyman* expressly overruled in *Hull v. Corcoran*, 107 Mass., 251; and we cannot but regard *Bosworth v. Swansey*, 10 Met., 363, and other cases in that State, which hold that towns are not liable for injuries caused to one who is traveling on the Sabbath by reason of a defective highway, as much shaken by the ruling in *Hall v. Corcoran*. But whether this be so or not is not material, as it is barely possible that the liability of towns may depend on a different principle. If not, we are

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Schmid v. Humphrey.

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prepared to say that such is not and cannot be the rule in this State.

The views herein expressed are sustained by *Bigelow v. Reed*, 51 Maine, 325; *Baker v. City of Portland*, 58 Id., 199; *Moheny v. Cook*, 26 Pa. St., 342; *Sutton v. Wauwatosa*, 29 Wis., 21; *Kerwhacker v. C., C. & C. R. Co.*, 3 Ohio St., 172; *Phil., Wil. & Balt. R. Co. v. Phil. Tow-boat Co.*, 23 How., 209.

II. The twelfth instruction has reference to the degree of care to be exercised by the plaintiff after the horse became frightened. The rule of the instruction is that he must have used ordinary care. The appellant insists that, under the circumstances of this case, he should have been held to the exercise of extraordinary care. But, conceding there is a practical difference between the two, there is nothing in this case which should take it out of the ordinary rule.

III. The appellant insists that the plaintiff's "negligence contributed to the injury;" "that plaintiff did not maintain his 2. —:—. allegations of ownership or harboring the dogs by defendant;" "that the dogs were not proved vicious," and "that no attack was proved;" that is, as we understand, the dogs did not bite or attack the horse. We do not believe it essential that the dogs should have bitten the horse, but it is sufficient if they ran after and barked at him, and there was evidence so tending. The instructions as to the several matters above stated are not, we think, seriously questioned; but, if in error as to this, we have no hesitation in affirming their correctness. The real point made is that the evidence does not support the verdict. There was evidence tending to support each point necessary to be proved by the plaintiff, and we are unable to say the verdict is not sufficiently supported by the evidence.

**AFFIRMED.**

**HARWOOD V. BROWNELL.**

1. **Taxation: IN AID OF RAILROADS: STATUTE OF LIMITATIONS.** Mandamus to compel the county treasurer to enter upon the tax books a tax voted in aid of a railway in 1868, but which was not certified up by the township trustees until 1876, would not be barred by the statute before three years after such certificate was made. Whether or not the statute of limitations would at any time operate to bar such a proceeding, *quere*.
2. ———: ———: **EXTENSION ON TAX BOOK.** The validity of the tax did not depend upon its extension on the tax books in the year in which it was voted, and the fact that it was not so extended would not prevent it from being afterward entered thereon as an unpaid tax of a former year.
3. ———: ———: **WARRANT.** It was not necessary that the clerk of the board of supervisors should attach to the list furnished the treasurer a warrant requiring him to collect the taxes therein levied.

*Appeal from Floyd District Court.*

WEDNESDAY, JUNE 12.

ON the 20th day of November, 1877, the plaintiff filed a petition as follows:

"That in the month of October, 1868, the Cedar Falls & Minnesota Railroad Company was engaged in constructing its railroad through Floyd county, and through Floyd township, in said county, and that, for the purpose of aiding said company in the construction of said road, an election was held in said Floyd township, on or about the 29th day of October, 1868, at which election the proposition was submitted to the legal voters of said township, in accordance with the provisions of chapter 48 of the Laws of the Twelfth General Assembly of the State of Iowa, as to whether said legal voters would aid, by the voting of a five per cent tax, the construction of said railroad, and at said election it was, by a majority of said votes, determined that such aid should

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be extended, and the trustees of said township, upon the canvassing of the vote, declared, in accordance with the provisions of said chapter 48, that said proposition was adopted, and thereupon said trustees determined the per cent of said tax to be five per cent on the assessed valuation of said township for the year 1868, and ordered the clerk of said township to certify a list of said tax, at said rate, to the clerk of the board of supervisors of said Floyd county; that said township clerk did, thereupon, about the 1st day of January, 1869, certify to the said clerk of the board of supervisors a list of said tax, in all respects in accordance with said trustees' order, and in accordance with the provisions of chapter 48 of said laws; that thereupon said clerk of the board of supervisors delivered to the county treasurer of Floyd county said tax list, and said treasurer proceeded at once to the collection of said tax, and as such treasurer collected about the sum of eight hundred dollars, and paid out said sum on the order of said company, and about the sum of twenty-five hundred dollars has been paid by various tax-payers, to the satisfaction of said railroad company, as provided by said law—all of said payments and collections having been made between November, 1868, and March 1, 1869; that about the sum of nine thousand dollars of said tax still remains unpaid, and said tax list has ever since been in the possession and custody of said county treasurer, and his successors in office, and is still in the possession of the defendant; that about the — day of February, 1874, the said railroad company executed to your petitioner an order, of which a copy is hereto attached, marked "A," whereby such treasurer was directed to pay the sum of ten thousand dollars, and the entire sum to be collected thereof, to petitioner, and said order was accompanied by an estimate of the engineer in charge of the construction of said railroad, whereby it appeared that more than fifty thousand dollars had been expended in the construction of said railroad through said Floyd township, and both said instruments were duly presented to defendant (a copy of said estimate is

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Harwood v. Brownell.

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hereto attached, marked "B"); that on or about the 14th day of December, 1876, the township trustees of Floyd township certified to defendant that said railroad company had in all respects complied with the statutes, and with all contracts and agreements in relation to said tax, and was entitled to receive the said tax, and said defendant thereupon gave notice, by publishing in a newspaper duly published in said Floyd county, as required by chapter 2 of the Laws of the Fourteenth General Assembly, for a period of sixty days, which was completed March 3, 1877, a notice that said trustees had so certified (a copy of said certificate of trustees, and of the notice published by said defendant, is hereto attached, marked "C"); that thereupon said tax became delinquent, and it became the duty of said treasurer to at once proceed to collect said tax; that plaintiff is still the owner of said order, and of all said tax."

Plaintiff also alleges "that he is personally interested in said tax, and in the collection of the same, and that he sustains and may sustain damages by the non-performance of said duties by said defendant and his successors, and by the non-collection of said tax; that he has frequently demanded of said defendant, since the publishing of said notice, that he place said tax as being delinquent on his books, but that defendant has wholly failed to do so, and that plaintiff has frequently demanded of defendant that he proceed to collect said tax, but that he has wholly neglected and failed to do so; that, wholly disregarding his duty in the premises, defendant has already advertised and sold the lands throughout said township and county for the taxes delinquent for 1876, but though plaintiff demanded that he include in said advertisement and sale said land included in said list, so far as the taxes thereon were unpaid, he has wholly neglected to do so, and all the taxes on said list, except as hereinbefore stated, still remain uncollected, with all the accrued interest and penalties thereon since March 1, 1877.

"Plaintiff has no adequate remedy at law to recover said



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Harwood v. Brownell.

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claim, except through the interposition of the court by *mandamus* to compel said officer and his successors in office to proceed to collect said tax. Wherefore plaintiff prays that a peremptory *mandamus* issue from this court, directed to defendant, and to each and every of his successors in office, commanding him and them to forthwith enter on the tax book of the current year, as a tax due on the assessment of 1868, as required by law, and commanding him and them to forthwith proceed to demand immediate payment of said tax of each and every person liable to the payment of the same, together with the usual penalties and interest, dating the same from March 1, 1877, and that should said tax-payers fail for sixty days to pay said tax, commanding that he at once proceed to make the same by distress and sale of the personal property liable for said taxes, and that he proceed to advertise in accordance with law, and to sell the lands liable for said taxes, or any part thereof."

Exhibit "A," attached to this petition, is an order of the Cedar Falls & Minnesota Railroad Company, directing the treasurer of Floyd county to pay to O. P. Harwood ten thousand dollars, or so much as may be collected from time to time, on account of a tax voted in Floyd township, Floyd county, Iowa, in the year 1868, to aid in the construction of said railroad in said township.

Exhibit "B" is a detailed statement of Judd Bradly, the engineer in charge, showing the expenditure by the Cedar Falls & Minnesota Railroad Company within said township, in the construction of said railroad, of the sum of sixty-five thousand two hundred and eleven dollars and seventeen cents. This exhibit further shows that the railroad was completed through Floyd township November 1, 1869.

Exhibit "C" bears date December 14, 1876, is signed by the township trustees of Floyd township, and is as follows:

*"To the County Treasurer of Floyd County, Iowa:*

*"We, the undersigned, trustees of Floyd township, do certify*

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that the Cedar Falls & Minnesota Railroad Company has in all respects complied with the statutes, and with all contracts and agreements referred to in section 2 of chapter 48 of the acts of the Twelfth General Assembly, in relation to the five per cent tax voted October 29, 1868, by this township, to aid in the construction of said railroad, and is entitled to said tax."

To this petition the defendant filed the following demurrer:

"1. The facts stated in the petition do not entitle the plaintiff to the relief demanded, in this, that it does not therefrom appear that the plaintiff, being a private individual, is personally interested therein, or that he sustained or may sustain damage by the non-performance of the alleged duty.

"2. It does not appear from the face of said petition that the said defendant or his predecessors in office were ever legally empowered or directed to collect the said tax.

"3. The said petition does not sufficiently describe or identify any tax as the assessment of any particular body or officer empowered by virtue of such office to make the assessment, and does not sufficiently describe or identify the said pretended tax list to make certain and clear that any recorded tax is sought to be enforced.

"4. It appears from the said petition that the said tax has never been spread upon the books of the defendant as county treasurer, and that the said defendant never received any warrant or direction from either the clerk of the board of supervisors or the county auditor, or from the board of supervisors, to collect the same in the same manner as the county tax is collected, or in any other manner.

"5. That it is no part of the duty of the county treasurer to spread taxes upon the record, and said petition fails to show facts making the same the duty of defendant in this particular case.

"6. That the relief demanded in said petition is founded upon an alleged list of taxes, and that a copy of the same is

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Harwood v. Brownell.

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not attached to said petition, nor any excuse given why the same is not attached.

"7. That it appears from the face of the petition that the cause of action is barred by the statute of limitations.

"8. That said petition does not show that the tax lists alleged to have been prepared were ever filed in the office of the clerk of the board of supervisors, or of the treasurer of Floyd county, nor does it show that said list ever became a part of the official records or books of the said offices, nor that they ever came officially into the possession of the said treasurer, nor brought officially to his knowledge, nor does it show any official duty connected therewith on the part of the board, nor any act whatever, except that of transportation or messengership."

The court overruled this demurrer and rendered judgment for the plaintiff. The defendant appeals.

*J. S. Root and Cleland & Eaton, for appellant.*

*Starr, Patterson & Harrison, for appellee.*

DAY, J.—I. Appellant first discusses and mainly relies upon the seventh ground of demurrer, that it appears from the face of the petition that the cause of action is barred by the statute of limitations. It will greatly conduce to clearness if we keep distinctly in view the relief sought in plaintiff's petition. The petition asks simply—*First*, that the treasurer be required to enter this tax on the tax book of the current year, as a tax due on the assessment of 1868; *second*, that he demand immediate payment of said tax of the persons liable to pay the same; *third*, that should said tax-payers fail for sixty days to pay the tax he proceed to make the same by distress and sale of personal property, and that he advertise and sell lands as by law required.

The relief demanded respecting the entry of the tax upon the tax books is in effect that the treasurer shall comply

1. TAXATION:  
in aid of rail-  
roads; statute  
of limitations.

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with the provisions of section 845 of the Code, which is as follows: "The treasurer, on receiving the tax book for each year, shall enter upon the same in separate columns, opposite each parcel of real property, or person's name on which or against whom any tax remains unpaid for either of the preceding years, the year or years for which such delinquent tax so remains due and unpaid." This duty is one which is renewed, and has an inception every year. Whenever a new tax book comes into the possession of the treasurer a duty arises to enter upon it the taxes remaining unpaid for the previous years.

It is difficult to see how the right to enforce a performance of this duty can be barred by the statute of limitations. It is quite clear, we think, that it cannot be barred so long as the right to enforce the collection of the tax exists. This tax was voted under the provisions of chapter 48, Laws of the Twelfth General Assembly. Under section 3 of this act, and the averments of the petition, this tax became due and collectible on the 1st day of January, 1869, for on that day, the petition alleges, the township clerk certified to the clerk of the board of supervisors a list of said tax in accordance with the provisions of chapter 48, Laws 1868. The petition further avers that the treasurer proceeded to the collection of said tax, and between the month of November, 1868, and March 1, 1869, collected about the sum of eight hundred dollars. Conceding, then, for the purposes of this case, that sub-division 3, section 2529 of the Code, applies to this proceeding and bars the action to compel the collection of the tax in three years, the statute, under the averments of the petition, commenced to run on the 1st day of March, 1869, and the action would have been barred on the 1st day of March, 1872. On the 17th day of February, 1872, chapter 2, Laws 1872, took effect.

In *Harwood v. Case*, 37 Iowa, 692, which was a proceeding for a writ of *mandamus* to compel the collection of the tax now in controversy, we held that the provisions of chapter 2,

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Harwood v. Brownell.

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Laws 1872, apply to a tax voted under chapter 48, Laws 1868. Section 1, chapter 2, Laws 1872, prohibits county treasurers and township collectors from collecting any tax voted in aid of a railroad under chapter 102, Laws 1870, in violation of the provisions of any special reservation or condition inserted in the notices calling the election, or contrary to any contract, agreement or stipulation in writing made between the railroad company to be benefited by the tax and the township, town, or city authorities, for the benefit of the people. Section 5 of this chapter provides that when the trustees of any township certify to the county treasurer that the railway company has, in all respects, complied with the statutes, and with all contracts and agreements referred to in section 2 of the act relative to such tax, and is entitled thereto, the treasurer shall give sixty days' notice thereof, by publication in some newspaper published in the county, and if there be no such newspaper, by posting three notices in the township from which the tax is collectible. And from the time of giving such notice, and not before, the tax shall become delinquent.

Chapter 50, Laws 1872, makes the provisions of the chapter above considered applicable to a tax voted under chapter 48, Laws 1868. The running of the statute was suspended by chapter 2, Laws 1872, until the township trustees complied with the provisions of section 5 thereof. The township trustees refused to give the certificate required of them, and this gave rise to *Harwood v. Quinby*, 44 Iowa, 385, in which the duty to execute such certificate was declared. The petition alleges that the township trustees made this certificate on the 14th day of December, 1876, and the defendant gave the notice required by chapter 2, Laws of 1872, which was completed March 3, 1877. Then the duty of the treasurer to collect this tax revived, and, if the statute of limitations applies, it then began to run. Chapter 10, Laws of 1872, refers to taxes voted under chapter 102, Laws of 1870, and is not applicable to this case. It follows that the action is not barred by the statute of limitations.

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Harwood v. Brownell.

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II. It is insisted that it is not the duty of the defendant to extend this tax upon the tax books for the year 1877, 2. —: —: because the tax has never been entered upon the extension on tax book. county tax book. The law under which this tax was voted provides that, if a majority of the votes polled be for taxation, the township trustees shall at once determine the per centum of the same, and cause their respective clerks to prepare and certify to the clerk of the board of supervisors, as soon as practicable, lists of the same, which shall be an equal percentage on the taxable property in such township, but shall not exceed five per cent on the assessed value of the property therein. The vote in question was had on the 29th day of October, 1868. The petition alleges specifically that all the requirements of this statute were complied with; that the township trustees determined the per cent of said tax to be five per cent on the assessed valuation of the township, and ordered the clerk of said township to certify a list of said tax at said rate to the clerk of the board of supervisors; that the township clerk, about the first day of January, 1869, certified to the clerk of the board of supervisors a list of said tax, in accordance with said trustees' order; that the clerk of the board of supervisors delivered said tax list to the county treasurer.

It is now urged that this tax cannot be extended upon the books as unpaid taxes of previous years, and consequently cannot be collected, because it was not originally entered upon the county tax book for the year 1868. The law nowhere requires this to be done. The law requires that the county tax list shall be delivered by the clerk of the board of supervisors to the treasurer by the first Monday in November. This tax was not voted until the 29th day of October, and it was not certified to the clerk of the board of supervisors until the January following. We cannot hold, in the absence of any provision upon the subject, that the validity of this tax depends upon its being extended upon the county tax book for the current year. In *Chicago, Dubuque & Minnesota*

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Harwood v. Brownell.

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*Railroad Company v. Olmstead*, 46 Iowa, 316, apparently relied upon by appellant, it did not appear from the petition that any list of the taxes had been placed in the treasurer's hands. The point whether the treasurer would be authorized to proceed upon a tax list made out by the township clerk and furnished to the treasurer by the clerk of the board of supervisors was not involved in that case.

III. It is claimed that the defendant is under no obligation to extend this tax upon the tax list for 1877, nor to collect the same, because it is not averred in the  
3. \_\_\_\_: \_\_\_\_: warrant. petition that the clerk of the board of supervisors attached to the list a warrant requiring the treasurer to collect the taxes therein levied. The provision requiring such warrant is contained in section 748 of the Revision, and applies to the general county tax list required to be delivered to the treasurer by the first Monday in November. No such provision is made respecting the tax in question. The law under which the tax was voted provides "that so soon as such tax lists are prepared the tax herein provided for shall be due and collectible in the same manner as the county tax is collected, and it shall be the duty of the treasurer of the county to proceed, by himself or deputy, to collect the same and to pay it into the treasury of such county." The tax list and the law confer upon the treasurer all the authority he requires, and impose the duty of proceeding to collect.

The provision that the tax shall be due and collectible in the same manner as other county tax is collected, refers to the means to be adopted to obtain payment, and not to the precedent steps necessary to constitute a legal tax or authorize its collection. The above discussion disposes of all the objections which require separate notice. The petition sets forth sufficient grounds for the relief demanded.

The demurrer was properly overruled.

**AFFIRMED.**

## PARKINSON v. PARKER.

48	667
112	121

1. **Damages : ACTION AGAINST ASSESSOR.** A tax-payer cannot recover damages against an assessor for over-assessment of his property, unless he shows that such assessment was made maliciously. The fact that the tax-payer swore to a list of property submitted by him would not affect the liability of the assessor for making the assessment greater than the amount fixed by the tax-payer.
2. ——— : ——— : **BOARD OF EQUALIZATION.** The failure of the tax-payer to appear before the board of equalization and apply for a reduction of his assessment, or the refusal of the board to reduce it, would not excuse the assessor for malicious wrong-doing.
3. **Juror : NON-RESIDENCE.** The non-residence of a juror cannot be established by the affidavit of a person who swore he heard the juror say he was not a resident of the State.

*Appeal from Clinton District Court.*

WEDNESDAY, JUNE 12.

IN 1871 the defendant was assessor in Bloomfield township, Clinton county, and as such assessed to the plaintiff, a citizen of that township, about nine thousand dollars of property, which the plaintiff avers was about eight thousand five hundred dollars more than he had, and the plaintiff further avers that the wrongful assessment was wilfully and maliciously made by the defendant, and that by reason of the wrong therein done he was compelled to pay taxes on more property than he ought, and that he sustained damages in the sum of three hundred dollars, for which sum he asks judgment.

The defendant denied all malice, averred that the plaintiff refused to make out a list of his property, and that he assessed him according to the best of his information. He further averred that the plaintiff had knowledge of the assessment before the first Monday of May following, when he might have appeared before the board of equalization and had



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 Parkinson v. Parker.
 

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the assessment corrected, and that he neglected to so appear. There was a trial by jury, and verdict for the plaintiff for two hundred and eighty dollars. Defendant appeals.

*Kirke W. Wheeler*, for appellant.

*W. E. Leffingwell*, for appellee.

ADAMS, J.—I. The court gave an instruction which contained these words: "To authorize a recovery you must be satisfied that the assessment made was too large either in the amount of property or the value thereof." The defendant complains of this instruction upon the ground that there is no allegation in the petition that the plaintiff was assessed for a greater amount of property than he owned, but only that his property was assessed at a greater value than it should have been. The precise language of the petition upon this point is in these words: "The defendant, disregarding his duty, and in violation thereof, did wilfully, maliciously and falsely assess his property to the value of about nine thousand dollars, or about eight thousand five hundred dollars more than he really had." The first clause might bear the construction contended for by defendant, but, taking the averment altogether, it appears to us that the charge is that the plaintiff was over-assessed as to amount rather than value, and that the defendant's objection is not well taken.

II. The court gave an instruction in these words: "It was the legal duty of the plaintiff to assist the defendant as  
 1. DAMAGES: action against  
 assessor.      assessor in making out a list of his property for the purposes of assessment, and to make oath or affirmation to its correctness, and if he did so do it would, for the purposes of this suit, be deemed to be correct, and the burden of proof would be on the defendant to show, if he so desired, that it was incorrect in fact; but even if this was not done by the plaintiff, either through neglect or refusal, it would not justify or excuse the defendant in maliciously making an over-assessment, but would only authorize him to make the

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Parkinson v. Parker.

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assessment according to the best information he could get from other sources; but his duty is to so make it—that is, according to the best information he could obtain, and not captiously, wantonly or maliciously.” The defendant complains of this instruction so far as it asserts that if the plaintiff made oath or affirmation to a list of property it would, for the purposes of this suit, be deemed to be correct, and the burden of proof would be upon the defendant, if he so desired to show that it was incorrect in fact. // The issue in the case is not as to whether the defendant over-assessed the plaintiff, but whether he did so maliciously, and the court expressly told the jury in an instruction that the defendant would not be liable for any mere error in judgment, but only in case he over-assessed the plaintiff maliciously. // It was incumbent upon the plaintiff to show, not only that he had been over-assessed by the defendant, but that it had been done maliciously. If the plaintiff presented to the defendant, as assessor, a list of his property under oath, and the defendant assessed to him a greater amount of property, according to the doctrine of the instruction that would be *prima facie* wrong. But suppose we should conclude that the court erred in this respect, was the plaintiff prejudiced? The plaintiff’s case was not made out by showing that the assessment was wrong. He could recover only upon showing that the defendant knew it to be wrong when he made it, and this involved a showing of something more than that the defendant knew it to be greater than the plaintiff’s sworn list, for he might and should have made it greater if he discovered other property.

Under the issues, instructions and verdict we must assume that it was proven that the defendant knew that the assessment was wrong when he made it. If it was so proven it appears to us that the question as to the *prima facie* correctness of the plaintiff’s list is of no consequence. The plaintiff claims that he presented a sworn list; that defendant, without discovering any omissions or supposing that he had discovered any, added a large amount of property. If

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he did this he would have been equally guilty if the plaintiff's list had not been sworn to. The fact, then, that it was sworn to (if such was the fact) was of no advantage to the plaintiff, even upon the theory of the instruction. We think, therefore, that the defendant has no ground of complaint.

III. But defendant contends that if plaintiff appeared before the board of equalization, and they refused to make the 2. —: —: correction, his damage was caused by their re-board of equalization. fusal; and if he failed to appear his damage was caused by his own negligence. To this it is sufficient to say that if defendant over-assessed plaintiff maliciously, and plaintiff failed to appear before the board, merely because he did not know that he was over-assessed, the defendant should not be allowed to escape the consequences of his malicious act. The jury was virtually so instructed. No evidence is brought up, and every presumption must be entertained in favor of the verdict.

IV. A question, however, is made by the defendant as to the burden of proof. The court instructed the jury that "if the plaintiff knew of the action of the defendant in relation to the assessment, and of which he now complains, in time to have protected himself against its consequences by the exercise of reasonable diligence, and that he then negligently or wilfully failed to do anything to that end, he cannot recover any damages in the premises that he might have protected himself against. The burden of proof to establish this defense is upon the defendant, and he must do so by a preponderance of evidence." The defendant contends that the burden was upon the plaintiff to show that he did not contribute to his injury by negligently failing to protect himself. In our opinion the instruction was quite favorable enough for the defendant. When a person does another an intentional injury we do not think he can require the person injured, as a condition of recovery, to prove that he could not have avoided or limited the injury.

## The State v. Wells.

V. The defendant claims that one of the jurors was a non-resident of Iowa, of which fact he was ignorant at the time of trial. The only evidence of the non-residence of the juror consists of certain affidavits to the effect that the affiants heard the juror say he was a non-resident. The affidavits are open to the objection of being merely hearsay evidence, so far as the fact of non-residence is concerned. They can be regarded only as establishing the fact that the juror said he was a non-resident, which mere statement, regardless of its truth, would of course be insufficient to justify us in setting aside the verdict.

We think the case should be

AFFIRMED.

## THE STATE V. WELLS.

48	671
89	615
48	671
86	126
48	671
109	826
109	680
48	671
115	172

1. **Criminal Law : SEDUCTION : CORROBORATION OF WITNESS.** A party cannot be convicted of seduction upon the testimony of the prosecuting witness, unless she be corroborated by other evidence tending to connect him with the commission of the offense. Circumstances stated which were held to be corroborative.
2. — : — : **PREVIOUS CHASTE CHARACTER.** A presumption obtains in favor of the previous chaste character of the prosecuting witness, and all evidence of improper conduct after the time of the alleged seduction is inadmissible.
3. — : — : **BURDEN OF PROOF.** In assailing the previous chaste character of the prosecuting witness the defendant must not only produce such evidence as would raise a reasonable doubt of chastity, but such as would overcome the presumption of law in its favor by a fair preponderance.

*Appeal from Polk District Court.*

WEDNESDAY, JUNE 12.

THE defendant was indicted, tried and convicted for seduction. He was sentenced to imprisonment in the penitentiary

for two years, and appeals to this court for a reversal of the judgment against him.

*Finch & Sickmon, and Barcroft, Given & Drabelle, for appellant.*

*J. F. McJunkin, Attorney General, for the State.*

ROTHROCK, CH. J.—I. The court instructed the jury that, "If a man ravish and carnally know a woman by force and against her will, he is guilty of rape, and not seduction."

It is urged that the verdict is contrary to the evidence, because the complaining witness testified that the defendant first had criminal intercourse with her by force and against her will. It is true she did so state while testifying as a witness, but again she frequently stated that she was unwilling, but finally yielded to his embraces by reason of his promises of marriage. Taking all her testimony with the surrounding circumstances, including the place where the alleged guilty act was consummated, and the conduct of the parties before and after the act, which we need not repeat, we think the jury were fairly warranted in finding that the crime, if any was committed, was not rape.

II. The court properly instructed the jury that the defendant could not be convicted upon the testimony of the prosecuting witness, "unless she be corroborated by other evidence tending to connect him with the commission of the offense."

1. CRIMINAL  
law: seduc-  
tion: corrob-  
oration of  
witness.

Counsel for appellant claim that there was no sufficient corroboration to justify the verdict. A careful examination of the evidence satisfies us that this objection is not well taken. It is abundantly shown, aside from the testimony of the complaining witnesses, that at the time of the alleged seduction the parties had entered into a marriage engagement. That such a relation existed is conceded. It further appears that she was delivered of a child at the usual time after the alleged intercourse, and that about the time the child was begotten

the defendant was a constant visitor at her father's house, where she resided, and was frequently and at stated times alone with her far into the night. In addition to this, it does not appear that at that time she had any other male company. Taking into consideration all these circumstances, we are not prepared to say that the jury were not warranted in finding that corroboration was sufficient. The court, in its fifth instruction to the jury, called attention to these circumstances as proper corroboration, and in this we think there was no error.

III. The statute provides that in order to constitute the crime the woman must have been of previously chaste character.

It is claimed the defendant should have been acquitted because it was shown in evidence that the prosecutrix, at and  
 2. —: —: before the alleged seduction, was not of chaste  
 previous character. Considering the presumption of chastity  
 chaste character. which obtains in cases of this character, in connection with the testimony of a large number of witnesses showing her reputation for chastity to have been good, we think the jury were warranted in finding that her character was pure, notwithstanding the evidence as to seeming unchaste and improper acts. And here we may say that the court did not err in excluding all evidence as to her improper acts and conduct after the time when the alleged seduction occurred. The statute is explicit. It is the *previous* chaste character only which is in issue.

IV. The defendant asked the court to instruct the jury as follows:

"1. That in all criminal cases the defendant is entitled to the benefit of any and all reasonable doubts, and that such  
 3. —: —: doubts extend to each and all of the material  
 burden of ingredients necessary to be shown by the State in  
 proof. order to constitute the offense charged, and that in all criminal prosecutions for seduction the chaste character of the woman alleged to have been seduced is a material ingredient,

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and is directly in issue; and, therefore, if you, as jurors, have a fair and reasonable doubt of the chaste character of Carrie M. Fisher prior to the time of the alleged seduction by the defendant, then the defendant is entitled to the benefit of such doubt, and you should acquit him."

This instruction was refused. The court on its own motion instructed that if, upon the whole evidence, there was a reasonable doubt of the guilt of the defendant he should be acquitted. Another instruction was given in these words:

"Every woman is by the law presumed to be of chaste character until the contrary is proven, and in a prosecution for seduction the woman alleged to have been seduced is presumed to have been of chaste character prior to her alleged seduction, and the burden of overcoming this presumption is upon the defendant, and to do this he must by a preponderance of evidence establish that, prior to the time of her alleged seduction, she was a woman of unchaste character."

The instruction asked was directed to a reasonable doubt of the chaste character of the prosecutrix, and because it was thus limited it was properly refused. It was also correctly refused because the instruction given by the court that the chaste character of the prosecutrix was presumed, and the burden was on the defendant to overcome the presumption, was not erroneous. *Andre v. The State*, 5 Iowa, 389; *State v. Shean*, 32 Id., 88.

We have frequently held that where insanity is sought to be established as an excuse for a criminal act, the presumption of sanity must be overcome by a preponderance of evidence. See *State v. Bruce*, 530, *ante*; and as applied to the defense of *alibi* see *State v. Henry*, 403, *ante*; and *State v. Northrup*, 583, *ante*. Upon the same principle it was necessary for the defendant not merely to produce such evidence as would raise a reasonable doubt of chaste character, but such as would overcome the presumption of law by a fair preponderance.

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The City of Independence v. Purdy.

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IV. One of the grounds of the motion for a new trial was newly discovered evidence. Two affidavits were filed in support of the motion, one setting forth that one Ray stated to affiant that he had arranged with the prosecutrix to spend an evening with her at her home, and the other that said Ray told affiant that he had criminal intercourse with her before the alleged seduction.

No one testifies that he believes what Ray stated was the truth, nor that Ray would so testify if a new trial should be granted. Such a showing as is here made would not be sufficient for the continuance of a cause, and much less for a new trial.

V. A number of other exceptions were taken to the instructions given by the court to the jury, and to the refusal to give instructions asked. A careful examination of these exceptions, as well as of the whole record, leaves us satisfied that no prejudicial error occurred upon the trial in the court below.

Having passed upon what seems to us to be the material questions in the case, we conclude that the judgment must be

**AFFIRMED.**

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THE CITY OF INDEPENDENCE v. PURDY.

1. **Practice: CERTIFICATE OF JUDGE: APPEAL.** The certificate of the trial judge, contemplated by section 3173 of the Code, must be made before the adjournment of the term at which the judgment is rendered.

*Appeal from Buchanan Circuit Court.*

WEDNESDAY, JUNE 12.

THE amount in controversy in this action, as shown by the



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The City of Independence v. Purdy.

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pleadings, is less than one hundred dollars. A demurrer to the answer was sustained. Defendant appeals.

*James Jamison and Lake & Harmon*, for appellant.

*E. Haines*, for appellee.

ROTHROCK, CH. J.—The appellee moves to dismiss the appeal, because the certificate required by section 3173 of the  
1. PRACTICE: certificate of judge: appeal. Code was not made at the time of the rendition of the judgment, and not until after the adjournment of the term of court at which the judgment was rendered.

The motion must be sustained. The record shows that the demurrer was sustained on the 28th day of February, 1878. The defendant excepted, and was granted leave to amend his answer. It is further shown that special findings in writing, and a certificate of the judge that the demurrer involved "a principle of law that it is desirable to have the opinion of the Supreme Court," was filed March 6, 1878. An amended certificate was filed on the 9th day of March, 1878, setting forth the principles of law on which it was desirable to have the opinion of this court. It is conceded that the court below adjourned the term on the 28th day of February, 1878.

The appellant files, with his argument in reply, a certificate of the judge setting forth that the findings of fact and law, and the certificate, were made as soon as could be done conveniently after the term.

This certificate is no part of the record in the court below. It was made long after the cause was disposed of there, and is, therefore, not a part of the proceedings. Under the rule announced in *Bartle v. The City of Des Moines*, 37 Iowa, 635, we cannot consider it.

Counsel for appellee stipulated in writing to waive a transcript and submit the cause upon appellant's abstract, but reserved the right to move for a dismissal of the appeal.

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The State v. Ditton.

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Afterward it was deemed necessary, to properly present the motion, that there should be a transcript and an additional abstract, which appellee has filed. We think, in view of the stipulation, and in the further view that appellee is insisting upon a technical right which we feel bound to concede to it, the costs of the transcript and the additional abstract should be taxed to appellee, and it is so ordered.

The motion to dismiss the appeal is

SUSTAINED.

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THE STATE V. DITTON.

1. **Criminal Law: EVIDENCE: LARCENY.** Testimony showing that other stolen property than that alleged in the indictment to have been stolen was found in the possession of defendant is admissible, not for the purpose of proving defendant guilty of another offense, but to connect him with the larceny charged.

*Appeal from Buchanan District Court.*

WEDNESDAY, JUNE 12.

DEFENDANT was convicted of grand larceny and sentenced to confinement in the penitentiary for two years and eight months. He now prosecutes his appeal in this court.

*Bruckart & Ney*, for appellant.

*J. F. McJunkin*, Attorney General, for the State.

BECK, J.—I. The property described in the indictment, a horse, buggy and harness, was stolen from the barn of the owner in the night of the 15th of August, 1877. The next day, at nine o'clock A. M., defendant was seen by a lad in an unfrequented spot in the woods or brush, sitting upon the ground apparently as if he had just awakened from sleep. Near by was the stolen property, the horse tied to the

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The State v. Ditton.

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buggy. Defendant was afterward found by others near the property, and was finally arrested. He made statements to the effect that he had been pursuing two men who had stolen corn, and that he had found the stolen horse and buggy in the woods, and had been in pursuit of the thieves. He was without his coat, and stated that he had left it in a church not far away. A bucket, basket, some crackers, cheese and tobacco were found in the buggy. A coat which he admitted to be his was found in the church, and in one of the sleeves was a box of cigars.

The State was allowed to prove, against defendant's objection, that a store within fifty feet of the barn, from which the property had been taken, was on the same night entered, and the bucket, basket and other articles found in the buggy when discovered, and the box of cigars found in the sleeve of defendant's coat, had been taken therefrom. The admission of this testimony is insisted upon as being erroneous, for the reason that the commission of another crime could not be shown for the purpose of convicting defendant of the offense charged in the indictment. But the testimony was not introduced for the purpose of establishing a burglary or larceny of the basket, cigars and other property. It was to connect defendant with the larceny of the horse and buggy. He claimed to have been in pursuit of the thief, and not to have taken the property himself, and that he had left his coat in the church. With it was found a box of cigars, which was taken on the same night the horse and buggy were stolen, from a neighboring store. This would establish the untruthfulness of his statements touching the pursuit of the thief, and connect him with the larceny.

II. The defendant offered to file a written statement, being in effect an admission that the property had been stolen, but denying that he was guilty of the larceny. The court rightly rejected the paper. The admission was not required by the State, and the declaration of his innocence was not admissible

1. CRIMINAL  
law: evidence:  
larceny.

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Keniston v. Hewitt.

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in defendant's behalf. It was utterly incompetent for any purpose.

III. The fourth and fifth instructions given to the jury are complained of by defendant. The fourth directs the jury that the possession by defendant of the box of cigars stolen at the same time and place with the horse and buggy might be considered to connect defendant with the larceny; the fifth, that the presence of defendant at the place where the property was found, and his possession thereof, unexplained, tended to show defendant's guilt. These instructions are clearly correct, and applicable to the evidence in this case.

AFFIRMED.

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KENISTON V. HEWITT ET AL.

1. **Jurisdiction** : CERTIORARI : CIRCUIT COURT. Section 162 of the Code confers upon the Circuit Court exclusive jurisdiction in *certiorari* in civil matters.

*Appeal from Montgomery District Court.*

THURSDAY, JUNE 13.

THE plaintiff, upon application, caused to be issued from the District Court of Montgomery county a writ of *certiorari*, directed to the defendants, for the purpose of testing the legality of their proceedings in relation to the alteration of a public road, to which the defendants made answer and return. Afterward they filed a motion asking the court to dismiss the action, upon the ground, among others, that only the Circuit Court has jurisdiction in the supervision of inferior courts, tribunals and officers, in civil matters, to correct and prevent abuses such as is claimed in this action. The court sustained the motion. The plaintiff appeals.

*W. M. Wright*, for appellant.

*McPherson & Scott*, for appellees.

ADAMS, J.—The question in this case is as to whether the Circuit Court has exclusive jurisdiction in *certiorari* in civil matters. The defendants claim that a comparison of sections 161 and 162 of the Code will show that it has. The former section provides that the District Court shall have general supervision over all inferior courts and officers in criminal matters, to prevent and correct abuses where no other remedy is provided; and the latter section provides that the Circuit Court shall have general supervision of all inferior courts and officers in civil matters, to prevent and correct abuses where no other remedy is provided. It will be observed that it is not expressly provided that the jurisdiction of either court shall be exclusive in respect to such general supervision. But the jurisdiction of the District Court in such general supervision in criminal matters is, doubtless, exclusive, and we think that section 162 should be regarded as conferring upon the Circuit Court similar jurisdiction in general supervision in civil matters.

It is true it is provided in section 3217 of the Code that the writ of *certiorari* may be granted by the District or Circuit Court, and that the defendant shall certify to the court from which the writ issues. But this cannot mean that the writ may be granted by either, indiscriminately, in both criminal and civil matters. Such a construction would render nugatory the provisions above referred to, as contained in sections 161 and 162. It must mean that the writ may be granted by either court, but within the jurisdiction of the court, as defined by section 161 or 162.

**AFFIRMED.**

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Mallory v. Montgomery County.

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## MALLORY V. MONTGOMERY COUNTY.

1. **Contract : RATIFICATION : BOARD OF SUPERVISORS.** Where the board of supervisors had, in their individual capacity, consented to a change in a contract for the construction of a bridge, and after the bridge was completed appointed a committee to examine the same, with power to accept or reject it, *held*, that the appointment of the committee with the powers indicated, and a subsequent qualified acceptance by the board, did not amount to a ratification of the change in the contract.
2. ——— : ——— : ———. The acceptance of the bridge by the board being a condition of payment therefor, when they accepted it upon the condition that the contractor would take a specified sum for his work, the limitation of his recovery to that amount could not be made to depend upon his receiving it in full satisfaction.
3. ——— : **WIDTH OF BRIDGE.** The fact that the board contracted with plaintiff for the construction of a bridge of less than the width provided by statute would not affect plaintiff's right of action on the contract.

*Appeal from Mills Circuit Court.*

THURSDAY, MARCH 18, 1875.

THE plaintiff's petition alleges in the first count that in the month of February, 1868, the defendant entered into a written contract with one N. E. Snodgrass for the construction of a bridge across the Middle Nodaway river, near Villisca, for the sum of fourteen hundred and twenty-five dollars; that on the 8th day of April, 1869, said Snodgrass sold and transferred by writing his interest in said contract to the plaintiff; that about said last named date the defendant consented to a change in the construction of said bridge, and to the assignment of the contract for erecting same to the plaintiff; that said written contract is lost; that the bridge was to be built of pine timber and lumber; was to be a pile bridge, ninety-six feet long, and of three spans, sixty feet, twenty feet and sixteen feet respectively, and the contract

48	681
120	496

48	681
120	617

price for building the same was one thousand four hundred and twenty-five dollars, to be paid when the bridge was completed and accepted. This count of the petition further alleges the due construction of the bridge, the acceptance of the same by defendant, the payment thereon of divers sums amounting in the aggregate to one thousand dollars, and that there is due thereon four hundred and twenty-five dollars and interest, which defendant refuses to pay.

The second count alleges that, at the special instance and request of defendant, through its board of supervisors, plaintiff constructed a pile bridge across the Middle Nodaway river, near the town of Villisca, which is of the reasonable value of one thousand four hundred and twenty-five dollars; that defendant accepted the same, has paid one thousand dollars, and refuses to pay the balance due therefor.

Plaintiff asks judgment for four hundred and seventy-six dollars, based upon the contract mentioned in the first count, or the cause of action stated in the second count.

The defendant's answer is:

"1. A general denial.

"2. That the bridge in question was constructed fourteen feet wide, instead of sixteen feet in width, as by the statute provided.

"3. That defendant agreed to accept said bridge upon condition that plaintiff would receive in full, for the construction thereof, one thousand dollars; that defendant paid said sum, and plaintiff received it in full satisfaction of the cause of action stated.

"4. That after the completion of the bridge plaintiff presented his bill for the residue claimed to be due, to-wit: for the sum of six hundred dollars; that the board of supervisors of defendant passed upon said bill, and allowed and ordered to be paid thereon one hundred and seventy dollars and eighty-four cents in full of said claim, which plaintiff, with full knowledge, accepted.

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Mallory v. Montgomery County.

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"5. That plaintiff failed to build the bridge in accordance with the terms of the contract set up in the first count of the petition, and that in consideration of such failure the defendant offered to accept the bridge, and pay therefor one thousand dollars, which plaintiff received in full satisfaction of his claim.

"6. That the bridge was not built according to contract, nor in a good and workmanlike manner, to the damage of defendant in the sum of fifteen hundred dollars, for which, after deducting plaintiff's demand, defendant asks judgment."

Plaintiff replied, denying all the allegations of the answer. The written consent to the change in the contract is as follows:

"We, the undersigned, supervisors of the county of Montgomery, State of Iowa, do hereby consent to changing the plans and specifications of highway bridge across Middle Nodaway, on the south side of the town of Villisca, as let to Snodgrass, to a pile bridge, with one span of sixty feet, one twenty, and one sixteen feet. We also consent to the assignment by said Snodgrass to S. H. Mallory of all his interest in contract for constructing a bridge at the aforesaid place, and agree to pay said Mallory Snodgrass' contract price.

"JOSEPH CARLISLE,  
"P. P. JOHNSON,  
"S. C. DUNN,  
"JACOB McCULLY,  
"W. W. MERRITT."

The bridge which plaintiff constructed is what is called a Queen truss bridge. It consists of one span of sixty feet, and on the north a span of sixteen feet, called an approach or bank span, and on the south two like spans, each about twenty feet long. The only place there is any truss is in the sixty-foot span. The other spans are simply stringers with the floor laid on them.



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Mallory v. Montgomery County.

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The records of the board of supervisors, of date September 9, 1869, contain the following entry :

"On motion Joseph Carlisle, Jacob McCully and S. C. Dunn were appointed commissioners to examine the bridge across the Middle Nodaway river, near Villisca, and receive or reject said bridge, as they shall deem just and right after such examination, and report their doings at the meeting of this board in October."

Pursuant to this order the said committee, on the 20th day of October, 1869, filed their report as follows :

*"To the Board of Supervisors of Montgomery County, Iowa :*

"We, the committee duly appointed to examine a bridge south of Villisca, on Middle creek, built by S. H. Mallory, do return our report of our examination of said bridge as follows : Said bridge we are willing to receive by paying S. H. Mallory one thousand dollars therefor, that being the amount of money we consider it worth, and no more.

"JOSEPH CARLISLE, } Committee."  
"JACOB McCULLY, }

On the 4th day of January, 1870, being the second day of the January session of the board, the following proceeding was had :

"On motion P. P. Johnson and J. T. Patterson were appointed a committee on part of this board to settle with Mallory for building a bridge across the Middle Nodaway river, near Villisca, whenever the said Mallory shall demand such settlement."

On the 18th day of October, 1870, this committee submitted to the board the following report :

"Committee on Mallory bridge report in favor of allowing Mallory one hundred dollars more, making in all nine hundred and twenty-nine dollars and sixteen cents.

"P. P. JOHNSON,  
"J. T. PATTERSON."

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Mallory v. Montgomery County.

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On the 18th day of October, 1870, the board adopted the following order:

"Ordered by the board that S. H. Mallory be allowed the sum of one hundred and seventy dollars and eighty-four cents, out of bridge funds, balance due him."

The cause was tried by a jury, and a verdict was returned for plaintiff for three hundred and sixty dollars and fifty-eight cents. Motion for new trial overruled, and judgment upon the verdict. Defendant appeals.

*C. E. Richards*, for appellant.

*Wayne & McPherson* and *A. Beeson*, for appellee.

DAY, J.—I. It is conceded that the bridge is not constructed in accordance with the original written contract with Snodgrass. It is also conceded that the written assent of the various members of the board of supervisors to a change in the plan of construction does not bind the county. Respecting this the court properly instructed the jury as follows:

"The first question for you to determine is whether the defendant consented to the change in the construction of said bridge as specified in the writing signed by said Joseph Carlisle and others. That writing purports to be the act of the parties signing it individually, although supervisors, and on its face and of itself does not bind the county."

It is necessary, therefore, that there should be, by the members of the board of supervisors, as such board, some recognition of the right to make such change in the plan. For, as the board might, before the bridge was erected, have agreed to a change in the character of a structure, so they might during the process of erection, or after it was completed, assent to the changes made.

Hence it became a very material question in this case to determine, inasmuch as the paper signed by the members of the board did not bind the county, whether the board of

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Mallory v. Montgomery County.

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supervisors had done any other act adopting the change by which the county is bound. On this branch of the case the court instructed the jury as follows:

"2. If, however, you find from a preponderance of the evidence that the defendant, by its board of supervisors, afterward, at a regular meeting, ratified and adopted the acts of the said Carlisle and others, as specified in said writing, then it will be bound thereby, *and you are instructed that if you find from the evidence that the plaintiff, in the spring and summer of 1869, constructed said bridge after the plan as changed in the said writing; that said Carlisle and others signing said writing constituted a majority of said board of supervisors on the 7th of September, 1869, and that on the said 7th of September, 1869, after said bridge was built, the said board of supervisors, at a meeting then held, appointed a committee consisting of Joseph Carlisle, Jacob McCully and S. C. Dunn, then members of said board, to examine said bridge, with authority to receive or reject the same after such examination, and with instructions to report at the subsequent October session of said board thereon, you may from these facts infer a subsequent ratification of said change in the construction of said bridge, as indicated in said writing signed by said Joseph Carlisle and others, and set out in the first count of the petition.*"

The italics are ours. Down to the italics the instruction is clearly right. The remainder of it, we think, is erroneous. It is clear that an acceptance of the bridge after its completion by the board of supervisors would constitute a ratification of the change in the plan of construction. A committee, however, appointed by the board *to examine the bridge, with authority to receive or reject the same after such examination*, might either *receive or reject* the bridge. And it would be only their determination to *receive* the bridge that would amount, on the part of the board, to a ratification of the change. It certainly cannot be claimed that if said committee should, after examination, determine to reject the bridge, that never-

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Mallory v. Montgomery County.

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theless the board, by appointing the committee to examine the bridge, had adopted the change.

The instruction, therefore, is equivalent to a direction that from the appointment of a committee to examine the bridge and accept or reject the same, and to report their action to a subsequent meeting of the board, the jury might infer a report in favor of the acceptance of the bridge.

The evidence shows that the report actually made by the committee was adverse to the acceptance of the bridge at the contract price, and hence equivalent to a report rejecting the same, unless it could be had for less than the contract price. The contract price was one thousand four hundred and twenty-five dollars. The committee reported that they considered the bridge worth one thousand dollars, and no more, and that they were willing to receive it by paying Mallory that sum. This is equivalent to saying that they were not willing to receive it and pay one thousand four hundred and twenty-five dollars therefor. In other words, they say we will not take this bridge under the contract and at the contract price, because it is not built as agreed, but we are willing to make a new contract therefor, and to take it at one thousand dollars. Yet, notwithstanding this evidence, the jury are told that from the appointment of this committee to examine, and to receive or reject the bridge, they might infer a ratification of the change in the construction, as indicated in the writing signed by Joseph Carlisle and others. This writing signed by Carlisle and others fixes the price of the changed structure the same as that agreed to be paid Snodgrass, to-wit, one thousand four hundred and twenty-five dollars. A ratification by the board of the change agreed upon in this writing would amount to an agreement to pay therefor the original contract price; hence, if a ratification of the change is to be inferred from the appointment of the committee referred to, the county must pay for the bridge one thousand four hundred and twenty-five dollars, notwithstanding the

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Mallory v Montgomery County.

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condition upon which the committee reported in favor of accepting the same.

Appellee concedes that the use of the bridge by the inhabitants of the county would not, of itself, be an acceptance, and that the acts alone of the individual members of the board of supervisors would not bind the county. But he claims that a majority of the board of supervisors, when in regular session, and in all respects acting with authority, did receive the bridge after it was built.

It is claimed that there can be no such thing as a *conditional* acceptance; that there either was an acceptance or there was not. In other words, that there either was an *unconditional* acceptance, or there was *no* acceptance. And from this position appellee concludes that when the board undertook to make a conditional acceptance they in fact made an unconditional one, whereas we the rather conclude that, if there is no middle ground, by making a conditional acceptance they did not make an unconditional one, and hence they made no acceptance.

A little scrutiny of the position of appellee will, we think, show its unsoundness. And, for illustration, we will not go beyond the facts of this case. A board of supervisors contracts for the erection of a bridge on a public highway, according to a plan agreed upon, at a stipulated price of one thousand four hundred and twenty-five dollars. The contractor erects the structure after a plan entirely different. The mere use of the bridge by the public does not create any implied agreement on the part of the county to pay therefor. In order that there may arise an implied contract to pay for work, the benefit of which is received, the party to be bound must be in a situation where he is entirely free to elect whether he will or not accept of the work. *Zottman v. San Francisco*, 20 Cal., 106. The bridge in question being on a public highway, the county has no election but to permit the same to be used so long as it remains there.

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Hence some voluntary act of acceptance upon the part of the board of supervisors is necessary, in order that the county may be bound to pay for the work done. The board, through a committee appointed for that purpose, examines the bridge, and says to the contractor, "The bridge as constructed is worth but one thousand dollars; we are willing to receive it and pay you that sum." This act, appellee contends, is an unconditional acceptance, and that, although before it was done the county was not liable to pay for the bridge at all, yet after it was done the county became liable, even in excess of one thousand dollars, if it should be proved upon the trial that the bridge was worth more than that sum. This view, it seems to us, cannot be sustained. If the acceptance of the board is necessary to bind the county, and the board have the option to accept or reject, it must follow that they may make their acceptance subject to such conditions as they may see fit to impose.

II. The court further instructed the jury as follows:

"4. If, therefore, you find that of the committee, consisting of said Joseph Carlisle, Jacob McCully, and S. C. Dunn, referred to in my last instruction as appointed by said board of supervisors, on the 7th of September, 1869, to examine, and receive or reject, said bridge, a majority, to-wit, Joseph Carlisle and Jacob McCully, on the 20th of October, 1869, filed their report in favor of receiving said bridge of said Mallory, at the price of one thousand dollars, you will next inquire whether the said board subsequently adopted the recommendation of said committee, and, if yea, whether the plaintiff received said sum of one thousand dollars in full satisfaction of his claim against said county for constructing said bridge. \* \* \*

The instruction then sets forth a number of facts, which the jury are told would not constitute an acceptance of the one thousand dollars in full, nor estop plaintiff from recovering more.

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This instruction is erroneous, it seems to us, in that it makes the question whether plaintiff shall recover more than one thousand dollars to depend upon whether he received the thousand dollars in full satisfaction of his claim.

He was not, as we have seen, in a condition to recover anything, unless the county, by its board of supervisors, accepted the bridge. He could not compel them to accept. If, then, he could neither compel the board to accept the bridge, nor recover for constructing the same without their acceptance, it must follow that when they made their acceptance conditional upon his taking one thousand dollars therefor, the limitation of his recovery to that amount cannot be made to depend upon his receiving it in full satisfaction.

III. The Revision, § 822, provides that bridges must not  
3. \_\_\_\_ width be less than sixteen feet in width. Respecting this  
of bridge. the court instructed as follows:

"6. If, under my previous instructions, you find that the plaintiff, in other respects, is entitled to recover from the defendant in this suit, and you also find, among the facts developed by the evidence, that according to the plan and specifications referred to in the first count of the petition said bridge was to be fourteen feet wide, and that the same was so constructed as to width, you are instructed that that circumstance will not affect the plaintiff's right of action."

In giving this instruction the court did not err.

The action of the board in contracting for a bridge less than the statutory width was erroneous simply, and not void. *Knowles v. The City of Muscatine*, 20 Iowa, 248, and cases cited.

The views which we have already expressed determine the principal questions involved in the appeal, and render a consideration of the remaining errors assigned unnecessary.

For the reasons before given the judgment must be

REVERSED.

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## ON REHEARING.

DAY, J.—In a petition for rehearing our attention is called to the fact that the petition contains a count upon the *quantum meruit*, and it is insisted that under the instructions the jury must have found for the plaintiff under this count, and that the second instruction above considered could not have affected the case. Appellee, in support of this view, calls our attention to the following instruction of the court:

"5. Plaintiff's counsel having admitted in the argument that the plaintiff has not constructed the bridge in controversy in a good, workmanlike manner, as required in the contract set up in the first count of his petition, you should, under his allegations in his second count in said petition, allow him a reasonable compensation therefor, as the same may appear from the testimony, not exceeding the contract price, to-wit: one thousand four hundred and twenty-five dollars, less the payment of one thousand dollars acknowledged in the petition, and what, if any, sum you may find from the evidence it would be necessary to make the same such a bridge in quality and value as you may find to be required by said contract; but, if you find that the whole reasonable value of said bridge does not exceed one thousand dollars, the sum admitted to have been paid, you should find for the defendant." It is claimed that this instruction was not excepted to, and that it must be regarded as correct. We do not propose to consider the question of its correctness. It is evident that this instruction does not lose sight of the contract, nor contemplate a recovery independently of it. It directs the jury to allow a reasonable compensation, less what, if any, sum they might find it would be necessary to make the bridge such an one in quality and value as required by the contract; hence it became very material to determine under what contract plaintiff was operating—whether under the original or the substituted one—and the question of ratification becomes an element in the right to recover, even under this instruction. Indeed, this



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view is necessary to the harmony and consistency of the charge. In the first instruction the court charges that the first question for the jury to consider is whether defendant consented to the change in the construction of the bridge; and in the next instruction they are directed that they may infer such consent from certain enumerated acts. It cannot, therefore, be supposed that in the fifth instruction the court intended to charge that a recovery might be had independently of such consent. The whole case, as we understand it, was put to the jury upon the theory that some kind of a ratification of the changes in the plans made by Joseph Carlisle and others was necessary upon the part of the board, in order that plaintiff might recover, and this we understand the original argument of appellee to concede. The court erred, as we hold, in the instructions respecting the circumstances from which a ratification might be inferred.

The right to recover upon the *quantum meruit* alone, independently of a ratification of the change in the contract, was not passed upon in the court below, and we do not deem it proper to determine it now, in the present state of the record. Whatever is said in the foregoing opinion respecting the necessity of an acceptance of the bridge, to the right of plaintiff to recover, is limited to the right to recover upon the theory of the ratification of the change in the contract. Whether the plaintiff may recover upon the *quantum meruit* simply, without showing an acceptance of the bridge by the county, we for the present leave undetermined.

Appellee does not claim that the second instruction given by the court is correct. That it may have affected the defendant prejudicially there can, we think, be no doubt.

The petition for rehearing is

OVERRULED.

# APPENDIX.

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## NOTES OF CASES NOT OTHERWISE REPORTED.

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### CRANE V. GUTHRIE ET AL.

PRACTICE IN THE SUPREME COURT: WAIVER OF APPEAL.

TUESDAY, APRIL 2.

*George Crane*, for plaintiffs.

*Edward McCeney*, for defendants.

SEEVERS, J.—The plaintiff, Crane, appealed from that portion of the decree allowing Burton two hundred and forty dollars, and McNulty one thousand two hundred and fifty dollars. The foregoing opinion (see 47 Iowa, 542) was filed on December 18, 1877, and afterwards, within the time allowed by law, a petition for a rehearing was filed by Burton and McNulty, and on February 27, 1878, a motion was filed by them to dismiss the appeal of plaintiff on the ground that he (after the rendition of the decree below, and before the appeal had been determined) had “waived his appeal and accepted the provisions of the decree.”

It appears that in July, 1877, Crane caused to issue the execution contemplated in the decree, under and by virtue of which the lands therein described were sold to Crane August 15, 1877. The amount bid by him, however, was not paid to the sheriff, nor was any disposition made thereof in any manner inconsistent with the provisions of the decree, and the question is whether, by reason of the foregoing matters, this appeal should *now* be dismissed.

It is regarded as extremely doubtful whether this court, after a cause has been determined on its merits, can do anything more than grant a rehearing as to the several matters determined, or which, through inadvertence, were not decided. If the rehearing is not granted, it is doubtful whether we should consider matters not before us when the cause was decided. It may, therefore, be true that this motion comes too late; that it should have been made before the appeal was determined.

However this may be, we do not believe Crane has waived his appeal. If the decree had been affirmed, whatever title he obtained to the lands,

under the sale, would have been charged with the sums awarded by the decree to Burton and McNulty. Nothing was done by Crane, nor could he do anything, that would have the effect to displace, or in any manner prejudice, such lien. Crane had the right to prosecute his appeal unless he had obtained satisfaction of his judgment, or had done some act by which he accepted the provisions of the decree to such an extent as to charge himself absolutely with its burdens, or the defendants would be in some manner prejudiced by his action. But Burton and McNulty were in no manner prejudiced by the sale. Their lien was just as beneficial and perfect afterward as it was before.

A careful consideration of the petition for a rehearing has failed to satisfy us that it should be granted. It must, therefore, be overruled, and so must the motion.

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### ARNOLD V. MOSES.

**MALICIOUS PROSECUTION: PROBABLE CAUSE: FINDING OF MAGISTRATE.**

*Appeal from Jasper Circuit Court.*

WEDNESDAY, APRIL 3.

**ACTION** for malicious prosecution. The petition states that defendant maliciously, and without reasonable and probable cause therefor, charged the plaintiff with the crime of larceny, and caused him to be taken before a justice of the peace and tried for said offense; that by reason of false and corrupt testimony the justice "bound over" the plaintiff to appear before the grand jury, by whom no indictment was found and the proceeding dismissed.

The defendant denied the allegations of the petition, and alleged he had fairly and fully stated all the facts to counsel, and was advised by them that there was evidence sufficient to warrant the conviction of the plaintiff.

There was a jury trial; a verdict for the plaintiff assessing his damages at eight hundred dollars, and judgment being rendered thereon the defendant appeals.

*Smith & Wilson*, for appellant.

*Galusha Parsons*, for appellee.

SEEVERS, J.—I. The instructions of the court in clear and concise language fully state the law applicable to the pleadings and evidence before the jury. These instructions are in no manner objected to except in a single particular, which will be presently considered, but it is urged in substance that the evidence was not sufficient to sustain the verdict; that is to say, the evidence did not affirmatively show defendant had not rea-

sonable and probable cause to commence the prosecution against the plaintiff. The jury having found otherwise, we cannot disturb the finding.

This conclusion has been reached by each member of the court on a separate reading of the abstract. It would serve no good purpose to state the evidence in detail.

II. The court fully and fairly instructed the jury as to what effect the advice of counsel should have as to the propriety of commencing the prosecution. The jury must have found the defendant did not fully and fairly state all the facts to his counsel, and we are agreed the evidence warranted such a finding.

III. The court gave the following instruction :

"13. The transcript of the magistrate introduced in evidence shows that the plaintiff was held to answer the charge made, and this was *prima facie* evidence of probable cause, but it is not conclusive upon this point, and it may be shown that in fact defendant had no probable cause for the prosecution."

It is insisted the finding of the magistrate is conclusive evidence of probable cause.

An instruction almost identical with the foregoing was approved in *Moffatt et al. v. Fisher*, 47 Iowa, 473, and there is nothing in *Ritchey v. Davis*, 11 Iowa, 124, that conflicts therewith. It is sufficient to say that we are content to rest our ruling in this case on *Moffatt v. Fisher*. The damages are not excessive, in our opinion.

Other errors are assigned, but not argued by counsel, and must, therefore, be deemed waived.

AFFIRMED.

EMMET COUNTY V. PETERSON ET UX.,

BURNHAM V. SANDS ET AL.,

MCCORMICK V. BROWN,

PARSONS V. KNIGHT,

FULLER & CO. V. TORKELSON.

*Appeals from Emmet Circuit Court.*

WEDNESDAY, APRIL 3.

DAY, J.—These cases involve the same question as that determined in *Gammon & Deering v. Knudson*, 46 Iowa, 455. Following that case, these cases must be

REVERSED.

## THE STATE V. RINEHART.

PRACTICE IN THE SUPREME COURT: BILL OF EXCEPTIONS.

*Appeal from Grundy District Court.*

WEDNESDAY, APRIL 3.

No appearance for either party.

ROTHROCK, CH. J.—The defendant was indicted for an assault with intent to murder. He was convicted of an assault with intent to inflict a great bodily injury. An appeal was taken and sixty days were allowed the defendant to prepare a bill of exceptions. The cause has been submitted to us upon the transcript alone, without abstract or argument. The transcript does not show that any bill of exceptions embodying the evidence has ever been signed by the judge who tried the cause. In this state of the record we cannot review the case upon the facts.

We discover no error in the instructions given by the court to the jury.

AFFIRMED.

## MUNGER V. GREGG.

PRACTICE IN THE SUPREME COURT: EXCEPTIONS: EVIDENCE.

*Appeal from Henry Circuit Court.*

WEDNESDAY, APRIL 17.

THE plaintiff claims of the defendant the sum of five thousand dollars, which he alleges to be due from defendant on a settlement of partnership accounts

The answer is a general denial. There was a jury trial, and a verdict and judgment for the defendant. The plaintiff appeals.

*Edward Crane*, for appellant.

No appearance for appellee.

DAY, J.—I. The abstract does not show that any appeal was taken, and hence it does not appear that the plaintiff is entitled to have any question considered.

II. The abstract does not show that any exception was taken, nor does it contain an assignment of errors. For that reason nothing is presented for our consideration.

III. The only point urged in argument is that the evidence does not sustain the verdict. It is not shown that all the evidence is abstracted.

The evidence set forth in the abstract shows it to be about equally balanced, with the preponderance, perhaps, slightly in favor of defendant.

Waiving the failure of the abstract to show the taking of an appeal, the judgment is

**AFFIRMED.**

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**BORTON V. BORTON.**

**DIVORCE: EVIDENCE CONSIDERED.**

*Appeal from Marshall Circuit Court.*

WEDNESDAY, APRIL 17.

**ACTION for divorce.** There was a decree granting the relief prayed for by plaintiff. Defendant appeals.

*Brown & Binford and O. L. Binford, for appellant.*

*Sears & Lemert, for appellee.*

**BECK, J.**—Plaintiff, alleging her marriage with defendant, and other matters necessary to be averred, claims a divorce on the ground that defendant had a lawful wife living at the time of his marriage to plaintiff. The defendant admits his prior marriage, but avers that he was never married to plaintiff. The issue thus formed involves the only question in the case. The testimony of the parties themselves is in utter conflict. Plaintiff testifies that the marriage was solemnized by a person introduced to her by defendant as a preacher. No one was present but the three. Defendant swears that the marriage was not solemnized.

It is shown in support of plaintiff's testimony that defendant procured a license from the clerk of the court for the marriage of the parties, and to satisfy him that the plaintiff was of proper age defendant introduced her to the clerk. The plaintiff testifies that immediately after the license was issued the marriage ceremony was performed. Within a very short time afterwards plaintiff claimed to others, in defendant's presence, that they were married. Defendant made no denial of the marriage. This claim was repeated by plaintiff, when defendant was present, who was again silent. There was no return of the license to the proper clerk's office, and there is no record of the marriage. The preacher solemnizing the marriage, as claimed by plaintiff, was not produced as a witness.

The parties lived together as man and wife for about four months, and a child is the result of the union.

Defendant testifies that his object in procuring the license was to create a public belief of his marriage with plaintiff in order to cover up their criminal cohabitation.

It is shown, in order to impeach plaintiff, that she executed an instrument acknowledging the receipt of two hundred dollars from defendant

as full satisfaction for her seduction, and the support of her child. We think the testimony tends to show that she was induced to sign the instrument by the influence which defendant possessed over her. At the time she claimed in defendant's presence that they were married, he did not deny it.

The parties show themselves to be unworthy of our full confidence; defendant surely is entitled to no respect or credit as a witness. If his own story be true he is no less a villain than he is shown to be if we believe plaintiff's testimony. In either view of his character, his utter disregard of moral obligations, his frontless impudence in confessing to one crime in order to escape the consequences of another, destroy all confidence in his testimony.

No objection is raised to the judgment so far as it is for an amount of money to be paid to plaintiff. We are not called upon to consider that part of the relief granted by the decree of the Circuit Court.

**AFFIRMED.**

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NIECE ET AL. V. WEED.

PRACTICE IN THE SUPREME COURT.

*Appeal from Butler District Court.*

THURSDAY, APRIL 18.

*G. C. Wright*, for appellant.

*Hemenway & Boomer*, for appellees.

PER CURIAM.—This is an action at law brought upon the covenants of warranty in a deed, and tried to a jury. There was a verdict and judgment for plaintiff. Defendant appeals.

The abstract shows that there were no exceptions taken to the instructions, and no bill of exceptions signed by the judge. It fails to show that the evidence is all before us. No errors are assigned. Notwithstanding the absence of the necessary preparation indicated for the trial of the cause in this court, we are favored with an argument assailing the judgment on the grounds that the verdict is in conflict with the testimony, and that certain testimony was erroneously admitted. We cannot consider the objections. The judgment of the District Court is

**AFFIRMED.**

## MALLORY &amp; Co. v. SAILING ET AL.

PRACTICE : PLEADING : VERIFICATION.

*Appeal from Union District Court.*

FRIDAY, APRIL 19.

ACTION on a promissory note. Judgment for the plaintiffs, and defendants appeal.

*Rowell & Millegan*, for appellants.

No appearance for appellees.

SEEVERS, J.—The petition, when filed, was not verified. The defendants did not verify their answer, and plaintiffs filed a motion to strike from the files. This motion was not pressed to a hearing, but was waived. Afterward the plaintiffs, by leave of the court, verified the petition, and thereupon asked for a default and judgment, which being granted, the defendants duly excepted.

This action of the court was erroneous. *Wolff & Hoppe v. Hagensick*, 10 Iowa, 590.

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REVERSED.

## FOSTER v. KEMP ET AL.

PRACTICE IN THE SUPREME COURT.

*Appeal from Muscatine District Court.*

FRIDAY, APRIL 19.

ACTION in equity to set aside a tax deed. Decree for defendants. Plaintiff appeals.

*D. C. Cloud*, for appellant.

*Richman & Carakadden*, for appellees.

ADAMS, J.—No motion or order was made for the trial of the case upon written evidence. It is not, therefore, triable *de novo*, and it could be tried only upon errors assigned, but no assignment of errors has been made. The appellees move to affirm, and we think that the motion must be sustained.

AFFIRMED.



## SPEIDEL V. SMITH.

## PRACTICE IN THE SUPREME COURT.

*Appeal from Henry District Court.*

FRIDAY, APRIL 19.

ACTION for an injunction against the defendant as road supervisor, to restrain him from opening a road. The application is based upon allegations that no road has been established, and no right acquired by the public in any way. A temporary injunction was granted, and afterwards, upon motion of the defendant, was dissolved; and afterwards, upon hearing, decree was rendered for defendant. The plaintiff appeals.

*H. & R. Ambler*, for appellant.

*Woolson & Babb*, for appellee.

ADAMS, J.—No motion or order was made for the trial of the case upon written evidence, and there is no assignment of errors. We have repeatedly held that such a case presents nothing for our determination. We may say, however, that a majority of the court are of the opinion that the finding of the court below that a road had been established by prescription is correct.

The decree of the court below must be

**AFFIRMED.**

## FLESHER V. GROVES.

## PRACTICE IN THE SUPREME COURT.

*Appeal from Polk Circuit Court.*

FRIDAY, APRIL 19.

ACTION in equity. Judgment for the plaintiff, and defendant appeals.

*M. D. McHenry & Son*, for appellant.

*St. John & Felshaw*, for appellee.

SEEVERS, J.—No motion was made in the court below for a trial on written evidence, and the trial was upon oral testimony taken before the court at the hearing. The evidence has not been certified by the trial judge and made a part of the record. The appellee objects that there cannot be a trial *de novo* in this court. This objection cannot be ignored, but must be sustained. Code, § 2742 *Vinsant v. Vinsant*, 47 Iowa, 594, and

numerous other cases. The only exception taken appears at the conclusion of the decree, and is as follows: "To this ruling and decree the defendant, Groves, excepts."

The abstract states: "The following testimony, as shown by the reporter's minutes certified and filed, was offered." Then follows what purports to be the evidence. This is followed by the decree, and then appears this statement: "The minutes of the reporter filed and certified in this case contain all the evidence offered by either party." The foregoing is all that appears in the abstract in relation to whether all the evidence introduced below is now before this court. This would probably be sufficient if the statute made the reporter's minutes evidence of such fact. This it does not do.

There are but three modes known to the law by which this court can know that all the testimony introduced on the trial below is before us. They are—*First*, by bill of exceptions, stating such fact; *second*, the certificate of the judge (Code, § 2742); and, *third*, the certificate of the judge, agreement of the parties or their attorneys, or certificate of the clerk. Code, § 3170.

The only errors assigned challenge the sufficiency of the evidence to sustain the decree. But as there is no proper and sufficient showing that all the testimony is before this court we cannot determine the questions presented.

**AFFIRMED.**

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### RUSH v. RUSH.

DIVORCE: RESIDENCE: JURISDICTION.

*Appeal from Monroe District Court.*

FRIDAY, APRIL 19.

#### SUPPLEMENTAL OPINION.

A PETITION for rehearing having been presented in this case (see 46 Iowa, 648), in which it is contended that a decree of divorce cannot be set aside on the ground that it was fraudulently obtained, it is proper that we should say that in this case the alleged fraud consisted, among other things, in assuming a colorable residence in Monroe county, where the action for divorce was brought, and decree rendered. The language of the petition upon this point is in the following words: "Said Henry Rush never had any residence in Monroe county, in good faith, but, on the contrary, the real residence of said Henry Rush for more than twenty years now last past has always been in the county of Fayette, in this State, where the plaintiff lived with him as his wife for the greater part of said time; that said Henry Rush, a few months previous to the April Term, 1875, of this court, fraudulently assumed a colorable residence in said Monroe county, in a community where he and the plaintiff were

entirely unknown, for the express purpose of obtaining a decree of divorce without the knowledge of this petitioner, so that she might not have an opportunity to answer or defend therein." The demurrer raised the question as to the sufficiency of the foregoing statement to entitle the plaintiff to relief. In overruling the demurrer we were of the opinion that the court below did not err. Section 2220 of the Code provides that the District or Circuit Court in the county where either party resides has jurisdiction of the subject-matter of divorce. If it is true that the defendant was not a resident of Monroe county, then the court did not acquire jurisdiction, and the authorities are abundant to the effect that, where there is a lack of jurisdiction through the fraud of the plaintiff in the action for divorce, the decree may be declared void. What would be the effect of fraud on the part of plaintiff in the action if the court had acquired jurisdiction, it was not necessary for us to determine, and it is proper that the decision should be limited strictly to the question raised. With this qualification of our opinion we are satisfied that it is correct, and the petition for a rehearing is overruled.

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### THE STATE V. RHODES.

CRIMINAL LAW: INDICTMENT: LARCENY.

*Appeal from Muhaska District Court.*

SATURDAY, APRIL 20.

*W. S. Kenworthy and Ira W. Anderson, for appellant*

*J. F. McJunkin, Attorney General, for the State.*

**PER CURLAM.**—The defendant was convicted of larceny upon an indictment charging that defendant, "in the day-time, did feloniously break and enter into the dwelling-house of one W. K., then and there being with intent to commit a public offense, to-wit: the crime of larceny, and did then and there steal, take and carry away the personal goods and clothes of said W. K.; two blankets of the value of six dollars each," etc., etc., describing the property stolen as being of the value of forty-three dollars. From the judgment upon the verdict defendant appeals to this court.

It was held in *The State v. Ridley & Johnson, ante*, p. 370, that an indictment substantially in the form of the one in this case would not support a conviction for larceny. Following that case the judgment of the District Court is

REVERSED.

## KING V. GODFREY.

SALE: EVIDENCE CONSIDERED.

*Appeal from Tama Circuit Court.*

SATURDAY, APRIL 20.

ACTION to recover possession of a horse. Trial to the court, judgment for the defendant, and plaintiff appeals.

*Stivers & Leland*, for appellant.*Struble & Goodrich*, for appellee.

SKEEVERS, J.—It is conceded that the horse belonged to the plaintiff, and that he was entitled to recover unless he had made a sale, or in such manner parted with his possession to one Stubbs, from whom the defendant obtained the horse, as would vest in the latter as against plaintiff the title by virtue of his purchase from Stubbs. The plaintiff claims he never sold the horse, and, on the other hand, the defendant claims he conditionally sold the horse to Stubbs and delivered the horse to him. The defendant further claims that the conditions of the sale were, as to him, void under section 1922 of the Code. Conceding the defendant to be right as to the legal effect of a conditional sale, there remains the question whether there was in fact a sale to Stubbs.

On this question the evidence is conflicting. That there was evidence tending to support the finding of the court cannot be doubted. As an original question, we might conclude the preponderance was with the defendant; but this is not sufficient, under the settled practice of this court, to justify us in setting the finding aside.

The evidence as to the execution, or rather the non-execution, of a note and mortgage was admissible, because it had some bearing on the question whether there had been a sale of the horse to Stubbs. In every other aspect the evidence was immaterial and could not have prejudiced the appellant.

AFFIRMED.

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NILES ET UX. V. KAHLE ET AL.

HOMESTEAD: PARTNERSHIP: MORTGAGE.

*Appeal from Pottawattamie District Court.*

SATURDAY, APRIL 20.

IN 1871 Jeffries, in consideration of "one thousand five hundred dollars in hand paid by Charles H. Hummel and Henry P. Niles, conveyed

unto said Hummel & Niles lots numbers nine and ten, in block number one," in Council Bluffs. The said Hummel and Niles were at that time partners doing business under the name and style of Hummel & Niles.

On March 1, 1872, "Charles Hummel and H. P. Niles, doing business under the firm name and style of Hummel & Niles," executed a mortgage on said premises, which was duly filed for record the same day. Afterward, and in 1873, an action was commenced, and said mortgage was duly foreclosed. A special execution was issued on the judgment, and the defendant being about to sell the same thereunder, the plaintiffs, who are husband and wife, commenced this action to enjoin the sale of said lot number ten, on the ground that the same constituted their homestead. A temporary injunction was allowed, which, at the hearing, was in part dissolved, and the plaintiffs appeal.

*Sapp, Lyman & Ament*, for appellants,

*M. S. Williams*, for appellee.

SEEVERS, J.—This cause is not triable *de novo* in this court, for the reason that no motion was made at any time in the court below for a trial there on written evidence. *Vinsant v. Vinsant*, 47 Iowa, 594.

It is claimed by the appellee that the real estate in question was partnership property, and, therefore, no homestead right attached therein against the creditors of the partnership. We do not deem it necessary to determine this question. The appellants claim that the plaintiff H. P. Niles and Hummel were owners in common, and that he purchased the interest of Hummel in said lot ten, and entered into possession under and by virtue of a parol contract, before the execution of the mortgage, and that the homestead rights of plaintiffs attached at the time possession was taken under the contract of purchase and sale. The defendants deny that there was any sale by Hummel, and a taking possession thereunder by plaintiffs previous to the execution of the mortgage. This question of fact the court below found to be as claimed by the defendants, and the court decreed that the undivided half of lot ten was liable to be sold in satisfaction of the execution issued on the judgment foreclosing the mortgage.

If the facts be as found by the court we do not understand counsel for defendants to dispute the conclusion of law adopted by the District Court.

The only evidence in addition to the record title consists of the testimony of the plaintiffs and Hummel. It cannot be said to be free from conflict.

For instance, the plaintiffs say they went into possession in the spring of 1871, and that they purchased the premises of Hummel before the mortgage was executed; while Hummel testifies the "plaintiffs rented the house of Hummel & Niles, and their tenancy commenced late in the fall of 1871, and remained therein as tenants until the fall of 1872, at the time when the deed was made to plaintiff from me of the undivided one-half of the house and one lot, during same fall." The deed spoken of

by Hummel appears to be dated on April 15, 1872, but it was not recorded until October 10, 1872. He, therefore, is probably mistaken when he states the deed was made in the fall. But this mistake, if it be one, is not material, for the reason that the mortgage was executed and recorded six weeks before the deed is dated.

The plaintiffs are unable to state that they entered into possession under a contract of purchase.

Under this state of the evidence we think the finding of the court is justified. But, if wrong in this, such finding is not so clearly against the evidence as to justify us in setting it aside.

In stating the testimony, wherever the abstracts conflict we have been governed by the amended abstract of defendant, as is the established practice.

**AFFIRMED.**

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**TYNER v. SEXTON & SON.**

**TAX SALE: COMBINATION OF BIDDERS: EVIDENCE.**

*Appeal from Dallas District Court.*

**THURSDAY, JUNE 6.**

THIS is an action in equity to set aside the defendants' tax title to a certain described eighty acres of land. One of the grounds upon which the relief is asked is that there was an illegal combination at the sale to prevent competition. The court decreed that the treasurer's deed be set aside, and that the plaintiff's title be quieted. The defendants appeal.

*Barcroft, Given & Drabell*, for appellants.

*Callovert, Macy & Smith*, for appellee.

DAY, J.—The evidence is conflicting. We think, however, that it establishes by a fair preponderance the existence of an agreement at the sale, upon the part of the bidders, not to bid against each other, and that Warford, who bid in the land as agent of defendants, was a party to such combination. It is true Warford testifies that he knew nothing of such a combination, but the facts established by the other witnesses are, we think, inconsistent with such statement. The proof brings the case within the principle of *Kerwer v. Allen*, 31 Iowa, 578.

It is not our practice to review fully the evidence in cases involving only questions of fact. The advantages to be derived from such a course would not be commensurate with the space which our opinions would occupy in the reports.

We are of opinion that the judgment of the court below should be

**AFFIRMED.**

## HOUGHLAND V. THOMPSON.

PRACTICE IN THE SUPREME COURT: ASSIGNMENT OF ERRORS.

*Appeal from Washington District Court.*

THURSDAY, JUNE 6.

*Dewey & Beard*, for appellant.

No appearance for appellee.

PER CURIAM.—This is an action at law to recover damages sustained by plaintiff on account of the failure of defendant to convey lands under a contract entered into with plaintiff, the title of which was subsequently divested by a tax sale and deed for taxes levied before the contract was entered into between the parties. Exceptions were taken to rulings upon the admission of evidence.

The plaintiff has failed to comply with a familiar rule prescribed by the statute and many decisions of this court, which requires errors to be assigned, and forbids us to consider questions not presented in an assignment of errors. As we have before us no assignment of errors, there are no questions which we can pass upon.

The judgment of the District Court must be

AFFIRMED.

## THE B., C. R. &amp; M. R. Co. ET AL. V. ROSS ET AL.

CONVEYANCE: SUBJECT TO INCUMBRANCE: CONSTRUCTION OF CONTRACT.

*Appeal from Linn District Court.*

SATURDAY, JUNE 8.

THE petition states that the plaintiffs recovered a judgment against I. W. Cresman, which became a lien on certain real estate; that afterward the defendants, in consideration of the conveyance of said real estate to them, agreed and promised in writing to pay said judgment. There was a demurrer to the petition, which, being overruled, the defendants appeal.

*J. W. Bull*, for appellants.*Hubbard, Clark & Deacon*, for appellees.

SEEVERS, J.—But a single question is presented on this appeal, and that is whether the defendants in writing promised and agreed to pay

the plaintiffs' judgment against Cresman; that the promise, if any such was made, was in writing is not denied.

After describing the real estate to be conveyed by Cresman to the defendants, the written agreement proceeds as follows: "Said property to be conveyed by said Cresman by warranty deed, subject only to the sum of six thousand four hundred dollars incumbrances (computing interest to January 1, 1877), which said Ross and Bull assume, so far as the same are found liens on the respective tracts of property."

To assume means "to take, or take upon one's self," and this is undoubtedly what the defendants did; that is to say, they took upon themselves the payment of six thousand four hundred dollars in liens on the real estate. The liens were not identified. In a subsequent writing, however, this was done, and among such was the plaintiffs' judgment. We have no hesitation in holding that the defendants assumed, agreed, and promised to pay the plaintiffs' judgment, and, therefore, the authorities cited by counsel for appellant are not applicable.

**AFFIRMED.**

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**CARLYON V. EADE.**

**CONTRACT: CONSTRUCTION OF: EVIDENCE.**

*Appeal from Mitchell District Court.*

**SATURDAY, JUNE 8.**

THE plaintiff sold and the defendant purchased of him certain real estate for the sum of two thousand dollars, of which one thousand dollars was to be paid in money at certain stated periods, and the residue by the conveyance of three hundred and twenty acres of land in Kossuth county, Iowa. The plaintiff claims the conveyance was not made, and this action is brought to recover the one thousand dollars.

There was a trial to the court, finding of facts, and judgment for plaintiff. The defendant appeals.

*Starr, Patterson & Harrison*, for appellant.

*Bush & Bush*, for appellee.

SEEVERS, J.—I. The contract in relation to the conveyance of the land is in writing, and provides, the "plaintiff shall have his choice of land of whatever he (the defendant) may have in Kossuth county, Iowa." The contract is silent as to the quantity of land owned by the defendant from which the selection could be made. On the trial the plaintiff sought to prove, and gave evidence so tending, that the defendant before, at the time, and after the written contract was executed, represented he had from three to five thousand acres from which a selection could be made. This evidence was objected to as being immaterial and irrelevant, and tending to



contradict or add to the written contract. The objection was overruled and the evidence admitted. The representations made after the written contract was executed were admitted to "explain the acts of the plaintiff subsequent to that time."

The contract provides that plaintiff shall have his choice of the lands owned by the defendant, the quantity being three hundred and twenty acres. The contract fairly construed implies that the defendant owned more than the latter quantity; otherwise, he could have no choice. The plaintiff was required to inform defendant that he was ready to avail himself of the privilege given him by the contract. To do this intelligently he must in some manner have informed himself as to the lands owned by the defendant. The lands embraced those owned, and not those only the record title of which was in the defendant. It is probable the plaintiff could ascertain the latter, but could not the former unless the defendant gave him the requisite information. Having been informed (it matters not from what source, or where) that defendant in fact owned from three thousand to five thousand acres, he was justified, if he could not obtain a description of them from the records, in demanding that defendant furnish him with a list thereof. There was evidence tending to show the plaintiff caused such an examination to be made, and that he demanded a list of the lands of defendant from which to make the selection.

The contract, we think, gives the plaintiff this right, and the evidence of representations made after the contract was executed, as to the quantity of lands belonging to defendant, was material and competent for the purpose for which it was admitted.

Suppose the defendant, before or at the time the contract was being written, stated he owned several thousand acres of land in Kossuth county, and the contract being silent in relation thereto, we think it was competent to prove such statements by parol. It in no way adds to the writing, or takes anything therefrom. The object was to ascertain or fix the quantity of lands to which the contract attached, and from which a selection could properly be made. The quantity beyond three hundred and twenty acres was indefinite. But the plaintiff was to have his choice from whatever quantity there was. If there were five thousand acres the plaintiff had the right to make his selection therefrom. If there were but five hundred acres then from such quantity. The object of the testimony was to ascertain and apply the contract to the subject-matter.

II. The other assignments of error argued by counsel relate to the sufficiency of the evidence to sustain the findings of fact. We have examined the testimony with care, and reach the conclusion that the fair preponderance is in favor of the findings made by the court. There may be some doubt as to the finding in relation to the deed made by defendant to plaintiff, and the retention thereof by the latter; but we are unable to say it is so clearly against the evidence as to justify us in setting it aside. The most that can be said is that different minds might therefrom come to different conclusions; but this is not sufficient under the settled practice of this court.

**AFFIRMED.**

## HUSSEY v. EASTMAN.

PRACTICE IN THE SUPREME COURT: EXCEPTIONS.

*Appeal from Buchanan Circuit Court.*

MONDAY, JUNE 10.

ACTION on a promissory note. There was a counter-claim pleaded in the answer. Trial to the court, judgment on the counter-claim for defendant, and plaintiff appeals.

*H. T. McNulty, A. S. Blair and Frank Jennings, for appellant.*

No appearance for appellee.

SEEVERS, J.—No exceptions were taken at any time, or to anything during the trial, or to the judgment of the court. No findings were made, nor was there a motion for a new trial.

To say the least, it is doubtful whether the record presents any question for our determination. But as the errors assigned relate to the sufficiency of the evidence to sustain the judgment, we have carefully examined the same, and are constrained to say the evidence supports the judgment. No beneficial purpose would be served in stating our reasons at length.

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**AFFIRMED.**

## LIEBFRTZ v. THE DUBUQUE STREET RAILWAY Co.

CORPORATION: LIABILITY FOR MONEY BORROWED BY OFFICER.

*Appeal from Dubuque Circuit Court.*

WEDNESDAY, JUNE 12.

THE petition contains two counts. The first claims to recover on a promissory note alleged to have been executed by the defendant, and the second is for money "had and received" of the plaintiff.

The material allegations of the petition were denied by the answer. Trial to the court and judgment for the plaintiff on the second count of the petition. The defendant appeals.

*D. J. Luchan, for appellant.*

*Fockler & Longueville, for appellee.*

SEEVERS, J.—There was no finding of facts, and the only assignment of error insisted on in argument by counsel is that the judgment is not sustained by the evidence.

At the time the alleged indebtedness occurred one Griss was defendant's superintendent, and an extension of the road was then being built. The money was borrowed of the plaintiff by Griss, to pay certain indebtedness

of the company, and it was so used. At least the evidence strongly so tended, and the court below must have so found. Certainly there is not such an entire want of testimony on this point as will authorize us to set aside the finding on the ground of passion or prejudice. On the contrary there is a fair preponderance in favor of the finding. Griss testifies he borrowed the money to pay a debt of defendant, and that he so used it. There is nothing except the cash account kept by him which it is claimed contradicts this statement. The court below heard and saw this witness, and had a better opportunity than we can possibly have to determine as to his credibility. There is nothing in the record that will warrant us in saying he did not speak the truth.

Such being the case, the force of the objection that Griss had no authority to contract the indebtedness is greatly broken.

Graves was president, and Rhomberg managing director, of the company. The latter, according to the testimony of both Graves and himself, was invested with all the power and authority of the former, and he exercised such power. Griss testifies he had "full control of the business of the defendant," and Rhomberg testifies Griss had "general supervision of the property." "He collected the regular fare, deposited all money, and paid all bills and employed the men." As to Griss' authority to create debts Rhomberg testifies: "Well, he always made some debts when he hadn't any money." There was a draft on the defendant about due, and Rhomberg states Griss told him he had borrowed the money from some of his workmen, and had paid the draft.

Under these circumstances it is immaterial whether Graves or the other directors had knowledge of the transaction or not. The knowledge of Rhomberg was sufficient. Through him the defendant had the requisite knowledge that the money had been borrowed for and applied to the purposes of the company, and its negligence in subsequently settling with Griss and allowing him for the money so borrowed, if such be true, cannot tend to establish the proposition that the plaintiff should not recover. The true question is, whether the money was borrowed for and applied to the payment of the indebtedness of the defendant. If this be true, the latter is responsible therefor, irrespective of the question whether the defendant has accounted therefor to some one else. Certain it is, the plaintiff never has been paid, and the judgment must be

**AFFIRMED.**

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### FIRST NATIONAL BANK OF CEDAR RAPIDS V. BEESON.

TAX SALE: REDEMPTION.

*Appeal from Tama Circuit Court.*

FRIDAY, JUNE 14.

ACTION to redeem from tax sales two lots in Tama City. The petition sets up that the fee simple title to the property is in the plaintiff, and that the defendant claims title under tax deeds which are alleged to be void, and

that the plaintiff is entitled to redeem from the tax sales upon which the deeds were executed, and prays that the plaintiff may be permitted to redeem from the tax sales. There was a decree for plaintiff. Defendant appeals.

*Struble & Goodrich*, for appellant.

*Hubbard, Clark & Deacon*, for appellees.

ADAMS, J.—The essential facts in this case, so far as the question of the validity of the deeds is concerned, are the same as those in *Robinson v. The First National Bank of Cedar Rapids*, ante, p. 354. The lots in question in the two cases are in the same block, and were sold for taxes under the same circumstances, and at the same sales. In the case of *Robinson v. The First National Bank of Cedar Rapids*, the deeds were held to be valid. For the same reason the deeds in this case must be held to be valid.

REVERSED.

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### McCAFFREY V. RICHEY ET AL.

EVIDENCE CONSIDERED.

*Appeal from Union District Court.*

FRIDAY, SEPTEMBER 19.

THE defendant Eagan obtained a judgment against John McCaffrey, the plaintiff's husband, on which an execution was issued, and levied on certain real estate the legal title to which was in the plaintiff. The object of this action was to enjoin the sale thereof, and establish plaintiff's title free and clear of the lien of said judgment. An injunction was issued. The answer denied that plaintiff was the owner of said real estate, and alleged the same was conveyed to plaintiff to defraud the creditors of her husband.

There was a trial to the court, a finding that the equities were with the defendants, and a decree accordingly. The plaintiff appeals.

*Hursh & Higbee*, for appellant.

*McDill & Sullivan*, for appellees.

SEEVERS, J.—I. Counsel for the appellant concede that this cause is not triable *de novo* in this court, but only on errors assigned, which we proceed to consider. It is insisted the finding is against the evidence. The case turns upon the testimony of the plaintiff. She states, on her examination in chief, that the lands in controversy were purchased with her money. She, however, was subjected to a lengthy cross-examination, and we are constrained to say the story told by her is, to say the least, of a somewhat unusual character. If she could be implicitly believed, however, the finding of the court is against the evidence. But she was examined in open court. Her conduct and demeanor on the stand have much to do with this question. The court below evidently disbelieved her story, and, considering the strange and unusual character of the transactions testified to, we

are unable to say the court was not justified in so doing. It will, of course, be understood the finding has the force and effect of a verdict of a jury.

II. It is insisted that improper testimony was admitted. But no such testimony is specifically pointed out. The complaint is that an extraordinary latitude was given to the cross-examination and matters inquired about that have no bearing on the matters in issue. We, however, see nothing in the examination to condemn, and clearly there was no prejudicial error.

III. The court decreed that the defendants might proceed and sell the real estate, and thereby obtain a satisfaction of the judgment. This action of the court is objected to, and it is also said there was no affirmative evidence in support of the allegations of the answer. But in neither of these particulars was there any error committed.

We deem it unnecessary to state our reasons for this conclusion.

**AFFIRMED.**

## AMENDED RULES OF PRACTICE IN THE SUPREME COURT.

ADOPTED JUNE 14, 1879, BY THE FOLLOWING ORDER:

*Ordered, That the following amended Rules of Practice be adopted, to take effect from this date.*

**RULE 19.**—At least thirty (30) days before the day assigned for the hearing of a cause, the appellant shall serve upon the attorney for each appellee a printed copy of so much of the abstract of record as may be necessary to a full understanding of the questions presented for decision (said abstract to be prepared as required by sections 97, 98 and 99). He shall also, fifteen (15) days before the first day of the term for which the cause is to be docketed for trial, file with the clerk ten (10) copies of said abstract, and no cause will be heard until thirty (30) days after such service, and fifteen (15) days after such filing with the clerk; nor shall it be docketed unless this and other rules shall be complied with. In case of cross-appeals the party first giving notice of appeal shall, under this rule, be considered the appellant.

**RULE 57.**—To entitle an appellant to submit his case, either orally or in print, he must serve copies of his brief of points and authorities, or argument, on counsel for each of the appellees at least thirty (30) days before the day assigned for the hearing of the case. The appellee shall serve copies of his brief or argument upon counsel for each appellant at least ten (10) days before the hearing, and the reply, if in print, shall be served at least three (3) days before the case is to be finally submitted. Each party shall file with the clerk ten (10) copies of each brief or argument before the case is so submitted. A failure to comply with above requirements will entitle the party not in default, unless the court shall for sufficient cause otherwise order, to a continuance, or to have the case submitted, at his option, upon the brief and argument on file when the default occurred. All briefs and arguments shall be prepared and printed as required by sections 94, 98 and 99 hereof.

**RULE 58.**—All arguments in addition to oral ones shall be in print; proper evidence of the service upon opposing counsel of printed matter in a cause shall be filed therewith; and the clerk shall note upon the docket the date of each service. All manuscripts and printed arguments shall be filed with the clerk, and he shall not transmit to the judges any paper not served and filed in time under the rules, nor shall any argument or brief be considered which does not go through the hands of the clerk. No cause shall be entered as submitted until the arguments are finally and actually concluded.

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See JURISDICTION, 2.

## CHATTEL MORTGAGE

See CRIMINAL LAW, 11.

## CIRCUIT COURT

See JURISDICTION, 2.

## CONSTITUTIONAL LAW.

See MINES AND MINING.

## CONTRACTS.

1. **CONSTRUCTION OF.** A contract between a party and a railroad company provided that he should furnish for the latter a specified sum of money to be expended as designated; and also, that he should be president, and should take possession of, and operate the road to the best advantage, devoting the earnings to certain specified objects, operating the road in the name of the company, and being paid for his services: *Held*, that the contract did not constitute a lease, and that his individual estate was not liable upon a contract entered into by the company prior to his contract therewith. *The United States Rolling Stock Company v. Potter*, 56.
2. **PAROL MODIFICATION: PRINCIPAL AND AGENT.** Where a contract has been reduced to writing, a party thereto is not authorized to rely upon the statements of the agent of the other party to the contract varying or modifying its terms. *Grimes v. Simpson Centenary College*, 208.
3. **SWAMP LANDS: PUBLIC POLICY.** A contract between a county and an agent provided that the latter should be authorized to make the proper application to the general government for its swamp lands, or indemnity therefor, and that he was to receive one-half of what he thus procured for his services. To effect the object of his contract, certain congressional action became necessary, which he aided in procuring by legitimate means: *Held*, that the contract was not void as against public policy, and that a county may lawfully employ agents for such purpose, and an agreement to pay them is valid. *Denison v. Orangeford County*, 211.
4. **EVIDENCE: VARIANCE.** Where the contract declared on was an agreement that the judgment debtor would elect to have his land sold subject to redemption rather than by appraisement, and the evidence showed the agreement to be an offer by the debtor to convey the land subject to the debt, it was *held* that the evidence did not establish the contract. *York v. Wallace*, 305.
5. **PLEADING.** In an action upon a contract it is not competent to show that performance was waived. The plaintiff can recover only upon the contract sued on, and he cannot allege a performance and prove facts in excuse of performance. *Fauble & Smith v. Davis et al.*, 462.
6. **MODIFICATIONS OF.** A party who contracts to erect a building according to certain plans and specifications, does not perform his contract by simply erecting a building equal in strength, value and convenience. To enable him to recover, any deviations from the requirements of the contract must be slight and unimportant. *Id.*
7. **BURDEN OF PROOF.** If the building was not completed within the time specified in the contract, the burden was upon the plaintiffs to show a valid excuse for their failure to perform the contract. *Id.*
8. **SEVERALTY.** The fact that one of the plaintiffs was to receive a certain fixed sum, and the other plaintiff another, did not render the contract several, and they could maintain a joint action thereon. *Id.*

9. **RATIFICATION: BOARD OF SUPERVISORS.** Where the board of supervisors had, in their individual capacity, consented to a change in a contract for the construction of a bridge, and after the bridge was completed appointed a committee to examine the same, with power to accept or reject it, *held*, that the appointment of the committee with the powers indicated, and a subsequent qualified acceptance by the board, did not amount to a ratification of the change in the contract. *Mallory v. Montgomery County*, 681.
10. ———: ———. The acceptance of the bridge by the board being a condition of payment therefor, when they accepted it upon the condition that the contractor would take a specified sum for his work, the limitation of his recovery to that amount could not be made to depend upon his receiving it in full satisfaction. *Id.*
11. **WIDTH OF BRIDGE.** The fact that the board contracted with plaintiff for the construction of a bridge of less than the width provided by statute would not affect plaintiff's right of action on the contract. *Id.*

See ATTORNEY, 2, 3.

DEED.

ESTOPPEL.

EVIDENCE, 6.

FRAUDULENT REPRESENTATIONS, 1, 2, 3, 4.

PATENT, 4.

PROMISSORY NOTE, 1, 2, 3.

RES ADJUDICATA, 2.

SALE, 1, 2, 3.

VENDOR AND VENDEE, 3.

## CORPORATION.

1. **STOCK: TRANSFER OF.** A by-law of a corporation which provides that transfers of stock shall not be valid unless approved by the board of directors, while it may be enforced as a reasonable regulation for the protection of the corporation against worthless stockholders, cannot be made available to defeat the rights of third persons. *The Farmers' & Merchants' Bank of Lineville v. Wasson*, 336.
2. ———: **LIEN UPON.** In the absence of a contract or provisions of its charter or by-laws to that effect, a corporation has no lien upon its shares in the hands of a stockholder to secure indebtedness from the stockholder to the corporation. *Id.*
3. **BANK: DUTY OF OFFICER.** The president of a bank, who was surety upon the note of a stockholder, took an assignment of the stock of the latter in the bank to secure himself against loss. The stockholder was at the time also a debtor of the bank, and in failing circumstances: *Held*, that in the absence of fraud or concealment on the part of the president, there was nothing in the transaction inconsistent with the faithful performance of his duty as an officer of the bank, or that would give the bank a claim in equity to the benefit of the security. *Id.*

See RECEIVER, 1.

TAXATION, 1, 2, 3, 4.

## COSTS.

1. **NEXT FRIEND.** In the absence of a statute providing otherwise, the next friend in an action by an infant plaintiff is liable for costs. *Vance v. Fall*, 364.
2. **APPORTIONMENT OF.** Where, in an action before a justice of the peace upon four separate items of demand, the judgment of the justice in favor of the plaintiff was appealed from, and the plaintiff recovered one dollar in the Circuit Court, *held*, that the case was a proper one for apportionment of costs. *Howder v. Overholser*, 365.

See PLEADING, 2.

RECORD OF JUDGMENT, 1.

## COUNTIES.

See BRIDGES, 1, 2.

CONTRACTS, 3, 9, 10, 11.

FEEs.

REWARD, 1, 2, 3.

SHERIFF, 1, 2.

## COUNTY SEAT.

1. **RE-LOCATION: REMONSTRANTS.** The names of persons appearing upon a petition for the submission of the question of the re-location of a county seat, which appear also upon a remonstrance against the submission of the question, are not to be counted on the petition. *Duffees v. Sherman et al.*, 287.

## CRIMINAL LAW.

1. **EVIDENCE.** Upon the trial of one indicted for larceny, evidence that he had compromised an action against him to recover the amount of the property alleged to have been stolen, is incompetent. *The State v. Emerson*, 172.
2. **POSSESSION OF STOLEN PROPERTY: EVIDENCE.** An instruction directing the jury that in order to rebut the presumption of guilt arising from possession of property recently stolen, defendant must, by a preponderance of testimony, reasonably satisfy the jury that his possession was innocent, was *held* to be erroneous. *Id.*
3. **EVIDENCE.** The ownership of property need not be established in the party from whom it is alleged to have been stolen, if it is shown to have been in his possession, and to have been stolen therefrom. *The State v. Stanley*, 221.
4. **AIDING AND ABETTING.** A person is guilty of aiding and abetting a larceny if, in accordance with an agreement therefor, he takes care of the family of the felon while the latter is disposing of the stolen property. *Id.*

5. **EVIDENCE: CORROBORATION.** The corroboration of the testimony of an accomplice is not limited to the testimony of witnesses, but may be circumstantial. *Id.*
6. **JURISDICTION.** Where an information before a justice of the peace charged a party with the commission of two offenses, of one of which the court had jurisdiction and one it did not, and he was thereupon found guilty, *held*, that the fact that the court did not have jurisdiction of one of the offenses would not oust it of jurisdiction of the other. *The State v. Silhoffer*, 283.
7. **COMPOUND OFFENSE: CONSTRUCTION OF STATUTE.** The term "compound offenses," as used in section 4300 of the Code, has reference only to cases where the same act constitutes in itself more crimes than one, and does not include cases in which two or more crimes are committed in succession. *The State v. Ridley and Johnson*, 370.
8. **PRACTICE: SPECIAL INTERROGATORIES TO JURY.** Section 2808 of the Code, providing for the submission of particular questions of fact to the jury, has reference to trials in civil actions only. *Id.*
9. **EVIDENCE: CONFESSION.** A confession of the commission of a crime, when voluntarily and freely made, is entitled to the highest credit, and to the greatest weight as evidence. *The State v. Brown*, 382.
10. **ALIBI: DEGREE OF PROOF REQUIRED.** To establish an *alibi* it is not necessary that the jury should be "fully satisfied" of its truth. *The State v. Henry*, 403.
11. **SALE OF MORTGAGED PROPERTY.** Where a mortgage of personal property provided that if the mortgagor removed it from the county the mortgagee might take possession of and sell it, *held*, that a removal and sale of it in another State, under the circumstances stated, did not constitute an offense indictable in the county where the mortgage was executed. *The State v. Julien*, 445.
12. **PLEADING.** An indictment charging the defendant with "wilfully and maliciously verbally threatening to kill and murder" another is sufficient, notwithstanding it does not set out the words used. *The State v. O'Mally*, 501.
13. ———. The gist of the offense being the threat, the fact that it was directed against two persons would not constitute it two offenses. *Id.*
14. **INSANITY.** To entitle the defendant in a criminal case to an acquittal, it is only necessary that the jury should be reasonably satisfied he was insane. If the weight or preponderance of evidence shows the insanity of the defendant, it raises a reasonable doubt of his guilt. *The State v. Bruce*, 530.
15. **QUALIFICATION OF JUROR.** A juror upon *voir dire* said: "I read an account of this matter in the papers, and came to the conclusion that defendant shot McNamara, and that it was a criminal thing for him to do. \* \* \* I have not formed such an opinion of the guilt or innocence of accused as would prevent me from rendering a true verdict." *Held*, that the juror had not formed such an unqualified opinion as would render him incompetent. *Id.*
16. **CONSPIRACY.** An indictment charging that the defendants did "conspire \* \* \* to cause \* \* \* S. to go with them \* \* \* with the view, purpose and intent, with the intention of bringing about a sham marriage or pretended marriage between her, the said S., and him, the said defendant, and thus bring about the seduction

of her, the said S., in violation of law," was held to charge a conspiracy to commit a crime. *The State v. Savoye*, 562.

17. ———: SEDUCTION. It is not necessary that such an indictment should in terms charge that the woman was unmarried and of previously chaste character. *Id.*
18. EVIDENCE: ADMISSION OF CO-CONSPIRATOR. The admission of a conspirator after the conspiracy is at an end, even upon a plea of guilty, is evidence only as against himself, and is not admissible against his alleged co-conspirators. *The State v. Arnold*, 566.
19. GIVING INTOXICATING LIQUORS TO MINORS. A party cannot justify the act of giving intoxicating liquors to a minor by establishing that he did it by the order of the parent, unless he shows that the order was in writing. *The State v. Coenan*, 567.
20. SEDUCTION: FORCE. Where, upon the trial of one indicted for seduction, the prosecuting witness testified that the defendant overpowered her, the court should have instructed the jury that, if the defendant accomplished his purpose by force, he was entitled to an acquittal. *The State v. Lewis*, 578.
21. EVIDENCE: GOOD CHARACTER. A person accused of a crime is in all cases permitted to introduce evidence tending to establish his previous good character, and it is for the jury, without instructions from the court in reference thereto, to determine its weight as they would that of any other fact in evidence. *The State v. Northrup et al.*, 583.
22. ALIBI: EVIDENCE. It requires only a preponderance of evidence to establish the defense of *alibi*. *Id.*
23. LARCENY: VALUE OF PROPERTY. Upon the trial of one indicted for larceny, where the value of the property alleged to have been stolen is in issue, the jury should be instructed to find, as the value of the property, what it would realize in the ordinary course of trade, and not merely what it was worth to the owner. *The State v. Smith*, 595.
24. ———: EVIDENCE. Where, upon the trial of one indicted for larceny, the value of the property alleged to have been stolen is in issue, the verdict of guilty will not be disturbed unless so manifestly against the evidence as to raise the presumption that it was not the result of an honest and intelligent exercise of the judgment of the jury. *The State v. Scott*, 597.
25. CONFESSION. A confession by one charged with forgery that he wrote the name of the party whose name is charged to have been forged, is not sufficient to authorize a conviction without other proof that the crime was in fact committed by some one. *The State v. Knowles*, 598.
26. ASSAULT WITH INTENT TO COMMIT MURDER. Facts considered under which it was held that the term of imprisonment of a person convicted of assault with intent to commit murder should be reduced from four years to two years and six months. *The State v. Doering*, 650.
27. SEDUCTION: CORROBORATION OF WITNESS. A party cannot be convicted of seduction upon the testimony of the prosecuting witness, unless she be corroborated by other evidence tending to connect him with the commission of the offense. Circumstances stated which were held to be corroborative. *The State v. Wells*, 671.



28. ———: **PREVIOUS CHASTE CHARACTER.** A presumption obtains in favor of the previous chaste character of the prosecuting witness, and all evidence of improper conduct after the time of the alleged seduction is inadmissible. *Id.*
29. ———: **BURDEN OF PROOF.** In assailing the previous chaste character of the prosecuting witness, the defendant must not only produce such evidence as would raise a reasonable doubt of chastity, but such as would overcome the presumption of law in its favor by a fair preponderance. *Id.*
30. **EVIDENCE: LARCENY.** Testimony showing that other stolen property than that alleged in the indictment to have been stolen was found in the possession of defendant is admissible, not for the purpose of proving defendant guilty of another offense, but to connect him with the larceny charged. *The State v. Ditton*, 677.

See **EVIDENCE**, 1.

**VENUE**, 2.

#### CUSTOM.

See **ATTORNEY**, 2.

#### DAMAGES.

1. **STOCK BREEDING: EVIDENCE.** In an action for damages by the owner of a thoroughbred cow against the owner of an unpedigreed bull which, being allowed to run at large, had got plaintiff's cow with calf, it was *held*, that a herd-book was not admissible without proof that it was recognized by breeders, and that plaintiff's cow was the one registered therein under the same name. *Crawford v. Williams*, 247.
2. **MEASURE OF.** The measure of damages in such a case is the difference in value of plaintiff's cow for breeding purposes before and after meeting defendant's bull. *Id.*
3. **OVERFLOW.** In an action for damages for injuries caused by the overflow of plaintiff's premises, alleged to have been occasioned by the construction of dams by the defendant, it was *held* that plaintiff was not entitled to recover, because the evidence showed that plaintiff would have suffered like injury if the dams had been removed. *Langdon v. The C. B. & Q. R. Co.*, 437.
4. **FRIGHTENING HORSE: WORK ON SUNDAY.** In an action for damages for injuries sustained by the plaintiff as the result of the frightening of his horse in the highway by the defendant's dogs, it was *held* that plaintiff's right to recover was not affected by the fact that the accident occurred on Sunday, while he was riding on a business errand. *Schmid v. Humphrey*, 652.
5. ———. It was not essential to plaintiff's right to recover that the dogs should have bitten the horse, but it was sufficient if they ran after and barked at him. *Id.*
6. **ACTION AGAINST ASSESSOR.** A tax payer cannot recover damages against an assessor for over-assessment of his property, unless he shows that such assessment was made maliciously. The fact that the tax payer swore to a list of property submitted to him would not affect the liability of the assessor making the assessment greater than the amount fixed by the tax payer. *Parkinson v. Parker*, 667.

7. ———: **BOARD OF EQUALIZATION.** The failure of the tax payer to appear before the board of equalization and apply for a reduction of his assessment, or the refusal of the board to reduce it, would not excuse the assessor for malicious wrong-doing. *Id.*

See ATTACHMENT, 4.

INTOXICATING LIQUORS, 1, 2, 3, 4, 5, 6.

STOCK, 2.

### DEED.

1. **CONSIDERATION: FRAUD.** An agreement to do a thing is a sufficient consideration to support a deed, even though, as a matter of fact, the agreement is never performed. The fact that a purchaser from the grantee believed that such an agreement would not support the deed, and that it never would be performed, would not make his purchase fraudulent, or invalidate his title. *Gray v. Lake et al.*, 505.

See EVIDENCE, 7.

MORTGAGE, 1.

STATUTE OF FRAUDS, 2.

### DOWER.

1. **HOMESTEAD.** Upon the death of her husband the widow is entitled, at her election, to retain the homestead in lieu of so much of her distributive share, or to have her distributive share so assigned as to include the homestead; but she is not entitled to the homestead and dower in the remainder of the estate. *Whitehead v. Conklin et al.*, 478.

See ATTACHMENT, 7.

HOMESTEAD, 6.

### EQUITABLE JURISDICTION.

1. **MISTAKE.** Equity will not interfere to correct the terms of an instrument in writing on the ground of mistake, unless the fact of the mistake be established beyond a reasonable doubt. *Hervey v. Savery et al.*, 313.

See JUDGMENT, 1, 5.

PATENT, 4.

### ESTOPPEL.

1. **IN PAIS: COLLATERAL SECURITY.** The plaintiff sold goods to the defendant upon the order of a railway company for which defendant was a contractor, and accepted the company's note, secured by mortgage bonds, in payment therefor. In an action of foreclosure against the company, it was held that defendant's claim was paid and discharged, and that plaintiff was entitled to hold the bonds against the company. *Held:*

1. That plaintiff was not estopped by the decision in the foreclosure suit to deny that the note was received by him in payment of the claim.
2. That plaintiff did not, by taking the note of the railway company, discharge defendant, if the note was taken under an agreement with defendant that it should be held as collateral.
3. That if defendant had paid, at any time before judgment, the claim of plaintiff, he would have been entitled to a transfer of the note and the security thereon. *Vogel & Bro. v. Wadsworth*, 28.

### EVIDENCE.

1. **SEDUCTION: CORROBORATION OF PROSECUTRIX.** In the trial of an indictment for seduction, the infant alleged to be the fruit thereof cannot be offered in evidence to corroborate the prosecutrix by reason of a supposed resemblance between the child and the defendant. *The State v. Danforth*, 43.
2. **TRIAL: PRACTICE.** Where upon the second trial of a case the parties agree that the reporter's notes of evidence upon the former trial may be used, it is competent for the plaintiff to withdraw any portion of the testimony offered by him upon the former trial, unless the defendant is prevented from introducing the evidence so withdrawn in his own behalf. *Henderson v. The C., R. I. & P. R. Co.*, 216.
3. **LIMITATION OF: PRACTICE IN SUPREME COURT.** Where a party objects to the admission of testimony generally, and the court thereupon admits it, but limits its effect, the party objecting cannot be heard on appeal to complain of the action of the court in thus limiting its effect. *Id.*
4. **ORDER OF INTRODUCTION: TRIAL.** The order of introduction of testimony rests largely within the discretion of the trial court, and appellant must show that he suffered prejudice by the exercise of that discretion before he can claim relief. *Duffee v. Judd*, 256.
5. **ATTORNEY'S FEE.** In an action on account for legal services the plaintiff testified that, pending his employment, an agreement was made between him and his client for "more than an ordinary fee," upon the ground that the employment involved him in some complications that were compromising him in his profession: *Held*, that he might be compelled to state upon cross-examination what those complications were. *Bolton v. Daily*, 348.
6. **BURDEN OF PROOF: CONTRACT.** The burden of proof is upon the plaintiff to establish a parol contract under which he seeks to recover. *Officer & Pusey v. Evans et al.*, 557.
7. **BOUNDARY LINE.** In an action involving the determination of the division line between certain city lots where the plaintiff claimed under a conveyance which described the land conveyed by a fixed monument, the testimony of a surveyor who platted the land, as to the location of certain stakes set by him, was properly rejected. *Seyer v. Curran et al.*, 580.
8. **SIGNATURE: LEASE.** A party seeking to establish the genuineness of the signature to an unrecorded lease has the burden of proof, and if

the preponderance of testimony be against the genuineness, any claim based thereon must fail. *Bevier v. Bevier*, 609.

See ATTACHMENT, 2, 3.

BRIDGES, 1.

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PROMISSORY NOTE, 2.

RES ADJUDICATA, 4.

TAX SALE AND DEED, 8.

TRUST.

## EXECUTION.

1. **EXEMPTION.** The building in which a photographer carries on his business, even though it be personal property, is not exempt from execution under section 3172 of the Code. *Holden v. Stranahan*, 70.

See HUSBAND AND WIFE, 1.

MORTGAGE, 11.

REPLEVIN, 1, 2.

## EXEMPTION.

See EXECUTION.

HOMESTEAD, 3.

## FEES.

1. **CITY MARSHAL.** Under section 536 of the Code, the marshal of a city is not entitled to recover from the county in which the city is located for services rendered in the administration of the criminal law. *Christ v. Polk County*, 302.

## INDEX.

## FENCES.

See STOCK, 1.

## FERRY.

See MUNICIPAL CORPORATION, 3.

## FOREIGN JUDGMENT.

See ATTACHMENT, 1.

## FRAUDULENT CONVEYANCE.

1. **PARTICIPATION IN THE FRAUD.** Fraud will not be imputed in the conveyance of real estate unless there was participation therein both by grantor and grantee. The latter must have had knowledge of the grantor's fraudulent purpose, or of such other facts as would have put him upon inquiry, or must have neglected to make such inquiries as a reasonably prudent man would have done under like circumstances. *Kellogg & Harris v. Aherin and McGann*, 299.
2. **PROOF OF INSOLVENCY.** In an action by a creditor to set aside a conveyance of real estate as fraudulent, it is not necessary that an execution shall have been returned *nulla bona*, if the creditor shall allege, and otherwise prove, the fact of insolvency. *Gordon v. Worthley et al.*, 429.
3. **CONSIDERATION OF MARRIAGE.** Where a conveyance was made to a woman by a party who held the property as trustee for another, under an agreement of marriage between the grantee and the latter, who was at the time married to another, but who was subsequently divorced, and who afterward carried out the agreement of marriage, *held*, that although the grantee might have been ignorant of the fact of her husband's insolvency at the time of the conveyance, yet it was, in fact, fraudulent, and should be set aside. *Id.*

See JUDICIAL SALE.

## FRAUDULENT REPRESENTATIONS.

1. **CONTRACT: EVIDENCE.** The defendant, the general manager of a railway company, made a contract with I. for the grading of a part of the road, and I. sub-let some of the work to D., who, having performed a portion of what he had agreed to do, by a fraudulent collusion with the engineer procured the acceptance of a draft by the defendant for work done under the sub-contract, notwithstanding such work had already been paid for by the contractor: *Held*, in an action upon the draft, that the defendant might be permitted to testify to the particulars of the contract between the contractor and the railway company. *The Delaware County Bank v. Duncombe*, 488.
2. ———: ———. Evidence to establish the relation in which defendant stood to the railway company was not incompetent. *Id.*
3. ———: ———. Proof of the conversation between the engineer, who procured the acceptance of the draft, and defendant at the time the draft was accepted, was admissible. *Id.*

4. ——— : ———. A civil engineer was properly permitted to testify to admeasurements of the work performed under the sub-contract, notwithstanding such admeasurements were not made until eight months after the draft was drawn. *Id.*
5. DRAFT: DISHONOR OF. The draft having been sent to a local bank for collection by the plaintiff, which held it as collateral for advances to be made, it was presented to defendant, who said it was a swindle, and who refused to pay it. After that plaintiff made all the advances upon it, upon which its claim of ownership was based: *Held*, that the local bank was the agent of the transmitting bank, and that the latter was, therefore, charged with notice of dishonor, and any defense which would be valid against it in the hands of the sub-contractor was also valid against the plaintiff. *Id.*
6. PRINCIPAL AND AGENT. It was proper to instruct the jury that, to make available the defense of false representations, the defendant must show, not only that the acceptance was obtained by false representations, but also that such representations were known to the sub-contractor. *Id.*

See SALE, 3.

VENDOR AND VENDEE, 1, 2.

#### HIGHWAY.

1. APPEAL FROM ASSESSMENT OF DAMAGES. Notice of appeal from an assessment of damages for the establishment of a highway must be served within twenty days, not only upon the county auditor, but also upon the applicant for damages, and if such notice is not served upon the latter within the time, the appeal cannot be regarded as perfected. *Spurrier v. Wirtner*, 486.
2. ——— : APPEARANCE. The voluntary appearance in the Circuit Court of the applicant, who has not been served with notice as required by statute, for the purpose of moving to dismiss the appeal, does not constitute a waiver of the requirement of the statute. *Id.*
3. ——— : ———. *Robertson v. The Eldora Railroad and Coal Company*, 27 Iowa, 245, construed and explained. *Id.*

#### HOMESTEAD.

1. ACTION TO CHARGE WITH LIEN: HOMESTEAD RIGHT MUST BE ASSERTED. One who, through ignorance of his homestead rights, neglects to assert them in defense of an action to charge the property with a lien, cannot afterwards maintain an action to prevent the enforcement of the lien. *Collins et al. v. Chantland et al.*, 241.
2. ——— : INTEREST OF MINOR IN. A minor has not such an interest in the homestead of his parents as will defeat the enforcement against it of a lien which is valid against the parents. *Id.*
3. HUSBAND AND WIFE: EXEMPTION. Where, upon the death of the husband, the homestead is set apart to the wife as her distributive share of the estate in fee simple, it is exempt from debts contracted prior to that time. *Knox v. Hanlon*, 252.
4. FUNERAL EXPENSES. Bills incurred in the last sickness, and funeral expenses, do not constitute charges upon the home-stead. *Id.*

5. **ANTECEDENT DEBTS.** The homestead descends to the issue of the owner charged with the debts of the latter which, in his life, could have been enforced against it, but free from such debts as could not, in his life-time, have been so enforced. *Moninger & Ringland v. Ramsey*, 368.
6. **DOWER: MORTGAGE.** When a widow elects to take her distributive share under the law, and when such share embraces a part or all of the homestead, she does not surrender the right to have the property, other than that set apart to her, first exhausted in the payment of a mortgage lien upon the whole premises. *Wilson v. Hardesty*, 515.
7. **DISCHARGE OF LIEN.** S., having a bond for a deed of land in which his homestead was included, made an assignment thereof to R., the wife refusing to join in the assignment. There were prior judgment liens upon the property, which R. discharged, and he then came into possession of a part of the property: *Held*, that the amount due from R. for the rent of the homestead, or so much thereof as he occupied, should be applied in reduction of his lien for the judgments. *Stinson v. Richardson et al.*, 541.
8. **TAX TITLE.** R., being in possession under an agreement to pay all back taxes, could not acquire a tax title on the property, and was entitled to recover only the amount paid by him, with six per cent interest. *Id.*
9. **EXISTING CREDITORS: HUSBAND AND WIFE.** A conveyance to the wife of real estate received in exchange for the homestead is not fraudulent as against existing creditors. *Officer & Pusey v. Evans et al.*, 557.

See DOWER.

#### HOMESTEAD ACT.

1. **MORTGAGE.** A person who has entered land under the homestead act can execute a valid mortgage upon the same prior to the time when he is entitled to make final proof. It is not the purpose of the act to protect the land so entered from a lien created thereon by the person entering it. *Fuller & Co. v. Hunt et al.*, 163.
2. ———. The execution of a mortgage is not of itself an alienation. *Id.*

#### HUSBAND AND WIFE.

1. **EXECUTION.** The husband is the head of the family within the meaning of the statute exempting from execution certain property with which he habitually earns his living. Such property belonging to the wife before her marriage, and used for the family support, is not exempt from execution levied under a judgment against her. *Van Doran v. Marden*, 186.
2. **LIABILITY OF WIFE.** The wife is personally liable with her husband for the expenses of the family, and a personal judgment may be rendered against her therefor, in a joint action against her and her husband, notwithstanding the husband may have been discharged in bankruptcy. *Jones v. Glass et al.*, 345.

See HOMESTEAD, 3, 9.

INJUNCTION.

1. **JURISDICTION: PRACTICE.** To restrain the enforcement of a judgment by execution, the remedy must be sought in the county and court where the judgment was rendered upon which the execution issued. The fact that the judgment may have been obtained in a county whose court had not jurisdiction, would not vary the rule. *Anderson v. Hall et al.*, 346.

INSTRUCTION.

1. **ERROR WITHOUT PREJUDICE.** The refusal to give an instruction asked, even though it correctly presents the law and is pertinent to the issues, will not justify reversal unless it appears that such refusal wrought prejudice to the appellant. *The Clinton National Bank v. Graves et al.*, 228.
2. **TO BE CONSIDERED TOGETHER.** The instructions in a case are to be read and considered as a whole, and an omission in one, if supplied in another, will not furnish ground for reversal. *Albertson v. The Kookuk & Des Moines R. Co.*, 292.
3. **ASSUMPTION OF FACT NOT PROVED.** An instruction is erroneous which assumes an allegation, not established by the evidence, to be true. *York v. Wallace*, 305.

See INSURANCE, 4.

PRACTICE, 8, 18.

PRACTICE IN THE SUPREME COURT, 13.

INSURANCE.

1. **WAIVER OF PRELIMINARY PROOF: EVIDENCE.** The assured having testified that he delivered to the adjusting agent of the company a paper containing a notice and estimate of his loss, and was told it was sufficient, and another witness having testified that the agent, upon being asked if any further notice or anything was required, answered there was not, it was held that a waiver of further preliminary proof might be inferred. *Edgerly v. The Farmers' Insurance Company*, 644.
2. —: **AGENT.** The policy stipulating that the preliminary proof should be delivered at the office of the company, a delivery to any officer in charge of the office was sufficient, and such officer was authorized to waive any further proof than that submitted. *Id.*
3. —: **EVIDENCE.** The paper delivered to the agent as preliminary proof was admissible only to establish the waiver, and not as evidence of the extent of plaintiff's damage. *Id.*
4. —: **INSTRUCTION.** The submission to the jury of the question of waiver of preliminary proof was not erroneous, under an averment that the paper served was accepted as preliminary proof. *Id.*

INTEREST.

See PLEADING, 6.

USURY, 2.



## INTOXICATING LIQUORS.

1. **DAMAGES: EVIDENCE.** In an action by the wife for damages for the sale of intoxicating liquors to her husband, whereby she has been injured in her means of support, she may show, to sustain a claim for exemplary damages, the number and age of her children, if she also shows that the defendant, prior to selling the liquor to her husband, had knowledge that she had such children, and that they were in danger of being injured or compelled to leave home. *Ward v. Thompson*, 588.
2. ———: ———. The plaintiff's husband was properly permitted to state about how much he had paid the defendant for liquors during the time for which damages were sought to be recovered, as a fact tending to show the injury the wife had received in her means of support. *Id.*
3. ———: **ANOTHER ACTION.** Evidence that plaintiff had commenced another similar action against another seller of intoxicating liquors, for damages accruing during the same period, was *held* to be inadmissible. *Id.*
4. ———: **PURCHASE BY WIFE.** If the wife purchased liquor for her husband from defendant under compulsion, or to keep him at home, she did not thereby defeat her right of action. *Id.*
5. ———: **PAIN AND ANGUISH.** Any violent interference with one's person is in law an injury, and mental suffering resulting therefrom is a ground for damages. *Id.*
6. ———: **BURDEN OF PROOF.** In such an action it was sufficient to instruct the jury with respect to the burden of proof that it was upon the plaintiff. *Id.*

## JUDGMENT.

1. **EQUITABLE JURISDICTION.** C. commenced an action against B. and others, aiding the same by attachment levied upon certain property as that of B. B.'s father commenced an action to recover possession of the attached property. An agreement for settlement of the actions was made in vacation, whereby B. undertook to settle the costs and the actions were to be dismissed, no time for the payment of costs being fixed. These not being paid at or before the time when the cases were triable, C. obtained judgment: *Held*, that equity would not interfere to set aside the judgment. *Bigelow v. Church et al.*, 175.
2. **MUST BE CONSTRUED IN LIGHT OF RECORD.** Where a judgment recited generally that notice had been served upon the defendant, and the record showed the service to have been by publication, *held*, that the recital would be taken to mean a service in that manner, and the judgment would be construed as *in rem* only, and not authorizing the issuance of a general execution. *Mayfield v. Bennett*, 194.
3. **EFFECT OF APPEARANCE AFTER JUDGMENT.** The appearance of the defendant after judgment, for the purpose of moving for a new trial, would not have the effect to render the judgment a personal one. *Id.*

4. **VACATION OF.** Proceedings to vacate a judgment for fraud practiced by the successful party, and unavoidable casualty and misfortune preventing a defense, must be commenced within one year from the date of the judgment, and notice thereof must be served upon the successful party, or his attorney, within that time. *Bond v. Epley*, 600.
5. **EQUITABLE JURISDICTION.** A court of equity will grant a new trial in an action at law, after the time for applying for relief under section 3157 of the Code has elapsed, only when proper reasons are shown for the application. Where a party was advised that the judgment had been obtained and then delayed nearly a year before making the application, when the time allowed by statute therefor had elapsed, it was *held* that he was not entitled to equitable relief. *Id.*
6. ——— : **NOTICE.** A notice of the commencement of the action served upon the wife of defendant, who was out of the State, and duly published in a weekly newspaper, summoning the defendant to appear at the time specified in the District Court of Linn county, was held sufficient as to place, and gave the court jurisdiction to render a judgment *in rem* against the attached property. *Id.*
7. ——— : **APPEARANCE.** Where an attorney appears for an absent defendant, and the latter, in a proceeding to vacate the judgment, alleges that the appearance was unauthorized, he has the burden to establish the fact by a preponderance of testimony. *Id.*

See **RAILROADS**, 2.

**RECORD OF JUDGMENT.**

**RES ADJUDICATA**, 1.

**SCHOOL DISTRICT**, 3, 5.

## JUDICIAL SALE.

1. **FRAUDULENT MORTGAGE.** Where a fraudulent mortgage had been executed to defraud the creditors of the mortgagor, and the land embraced therein was sold under an execution to satisfy a judgment, the mortgage being treated in the appraisalment and sale as a valid one, it was *held*, that the mortgagee could not, after the mortgage had been decreed fraudulent, maintain an action to set aside the sheriff's sale. *McDonald v. Johnson et al.*, 72.

See **MECHANIC'S LIEN**, 4.

**MORTGAGE**, 11.

**TENDER.**

## JURISDICTION.

1. **PLEADING** Where a case before a justice of the peace against several defendants had been settled by one of them before the time set for trial, and before the filing of an answer, and it had been so entered upon the docket, it was *held* to be too late after that time to file an answer and counter-claim. *Holmes v. Hull et al.*, 177.

2. **CERTIORARI; CIRCUIT COURT.** Section 162 of the Code confers upon the Circuit Court exclusive jurisdiction in *certiorari* in civil matters. *Kendleton v. Hewitt et al.*, 679.

See CRIMINAL LAW, 6.

EQUITABLE JURISDICTION.

INJUNCTION.

MORTGAGE, 9.

PATENT, 3.

RECORD OF JUDGMENT, 2.

SCHOOL DISTRICT, 5.

STOCK, 2.

### JUROR.

1. **NON-RESIDENCE.** The non-residence of a juror cannot be established by the affidavit of a person who swore he heard the juror say he was not a resident of the State. *Parkinson v. Parker*, 667.

See CRIMINAL LAW, 15.

PRACTICE, 21.

VERDICT, 2.

### LANDLORD AND TENANT.

1. **DAMAGE.** A. leased certain premises to S., who put B. in possession; by the terms of the lease A. was to have all the corn-stalks grown upon the premises; B. sold his crop of corn to defendant, who turned his cattle into the inclosure, and they destroyed the corn-stalks, and injured the fruit trees and shrubbery: *Held*, that defendant was liable for taking and using the corn-stalks, and for the injury to the trees and shrubbery. *Babley v. Vyse & Gatchie*, 481.

### LIEN.

See ATTACHMENT, 1.

ATTORNEY, 1.

CORPORATION, 2.

HOMESTEAD, 1, 2, 7.

MECHANIC'S LIEN.

RAILROADS, 2.

RES ADJUDICATA, 5.

### MECHANIC'S LIEN.

1. **PRIORITY OF MORTGAGE.** In an action to foreclose a mortgage, executed while the Revision was in force, it was *held*, not to be compe-

tent for the decree to provide that the realty should be sold and distributed in a certain proportion between the mortgagee and the holder of a mechanic's lien upon a structure erected on the land covered by the mortgage. *Brodt v. Rohkar et al. and Wilson et al.*, 36.

2. **SUB-CONTRACTOR.** To entitle a sub-contractor, or a party furnishing a sub-contractor with materials, to a lien therefor, he must give notice thereof to the owner or his agent, and his lien attaches only to the extent of the balance due the contractor at the time of giving the notice. *Culler & Parker v. McCormick, Hall & Porter*, 406.
3. **ORDER: CONDITIONAL ACCEPTANCE.** Where, under a contract for the erection of a building, the contractor gave to a party furnishing material an order upon the owner, which was accepted by him conditioned upon the performance of the contract, *held*, that whatever the contractor became entitled to thereafter must be applied to the payment of the order. *Id.*
4. **RAILROAD: JUDICIAL SALE.** The Burlington, Cedar Rapids & Minnesota Railway Company failed to pay the interest on its bonds November 1, 1873. The bondholders funded the interest coupons upon the bonds for the term of eighteen months, until May 1, 1878, and continued the railway company in possession and operation of the road until May 19, 1875, when proceedings for foreclosure were instituted, and the road was placed in the hands of a receiver, a decree of foreclosure being subsequently entered. The road was sold thereunder and purchased by the bondholders, who conveyed it to the Burlington, Cedar Rapids & Northern Railway Company, who have since operated it. In September, 1874, the plaintiff furnished material for and constructed certain fence for the company, for which he presented a bill, which has been on file in the office of the auditor since September 25, 1874, and on that date the company gave plaintiff a note for the amount, the said note being entered on the bills payable book of the company. On the 28th of November, 1876, the plaintiff filed his mechanic's lien. *Held*, that the lien not being filed until after the lapse of more than ninety days, and the purchasers of the road having acted in good faith, the lien could not be enforced.

*Argument 1.* A mere entry upon the books of the old corporation could not be construed into notice to the bondholders that plaintiff was entitled to a lien.

*Argument 2.* A judgment creditor, purchasing at judicial sale, stands upon the same footing, and is entitled to the same protection, as any other purchaser.

*Argument 3.* The B., C. R. & M. Ry. Co., during the eighteen months it operated the road after default in interest, was not the trustee of the bondholders. *Bear v. The B., C. R. & M. Ry. Co. et al.*, 619.

5. **REPAIRS: PRIORITY OF MORTGAGE.** The lien of a mechanic for repairs upon a completed railway is not paramount and superior to the lien of a mortgage executed after the commencement and before the completion of the road. *Id.*
6. ———: ———. Nor will the lien of the mechanic upon the particular work performed by him take precedence of the mortgage, when the improvements he has made constitute an integral part of the road. *Id.*

#### MINES AND MINING.

1. **DRAINAGE: CONSTITUTIONAL LAW.** Section 1229 of the Code, providing that any person who shall, by drains or adit levels, rid lead-

bearing mineral lands of water, making them productive or available for mining purposes, shall be entitled to receive one-tenth of all the lead mineral taken therefrom, is not in conflict with the constitution.

*Argument 1.* The statute is identical in principle with those regulating party walls and partition fences, and provides only that one should compensate another for outlays lawfully made, by which he himself has been benefited.

*Argument 2.* The act of building the adit is lawful, because it tends to promote the public interest, and is productive of public good. ROTHROCK, Ch. J., and SEEVERS, J., *dissenting*. *Ahern v. The Dubuque Lead and Level Mining Co. et al.*, 140.

### MINOR.

See CRIMINAL LAW, 19.

HOMESTEAD, 2.

### MORTGAGE.

1. **QUITCLAIM.** Where one takes a quitclaim deed from the mortgagor, paying a consideration less than the value of the land diminished by the amount of the mortgage, with full knowledge of it and in the belief that it is valid, equity requires that as against him the land be charged with the payment of the mortgage debt, without regard to any infirmity that may inhere in the mortgage, unless it be void as against public policy. *Fuller & Co. v. Hunt et al.*, 163.
2. **TRANSFER OF: PROMISSORY NOTE.** The transfer of a promissory note carries with it the mortgage executed to secure it, and the mortgagee, after the transfer of the note, has no such control over the security that he can discharge or impair it to the prejudice of the transferee. *Vandercook v. Baker et al.*, 199.
3. **RECORDING OF: EVIDENCE.** Where a party testified that at the time of filing a mortgage for record no other incumbrance upon the property appeared of record, while the recorder testified that the entry of another mortgage, prior in date and appearing to be of prior record, had previously been made, and under his supervision, *held*, that the presumption in favor of the record would prevail. *Id.*
4. **PROMISSORY NOTE: FRAUD.** The assignee of the promissory note is not chargeable with the fraud of the mortgagee in procuring the registry of a mortgage executed to secure it. *Id.*
5. **PRIORITY.** A mortgage containing covenants of warranty does not take priority over one of earlier registration which contains no such covenants. *Id.*
6. **RELEASE.** The release by the mortgagee of his interest acquired by foreclosure and sale, after a junior mortgagee has set up his right to redeem, will not have the effect to defeat such right. *Hervey v. Savery et al.*, 313.
7. **PARTY.** One to whom the senior mortgagee may have conveyed his interest acquired by the foreclosure and sale, is not a necessary party to the proceeding to enforce the right of redemption, provided such conveyance be made pending the proceeding. *Id.*

8. **ADMINISTRATOR.** A mortgage by an administrator, in which the name of the mortgagor does not appear, cannot be approved by the probate court. To render a mortgage by an administrator valid, it must be capable of identification as the one approved by the court. *McMannis et al. v. Rice*, 361.
9. **JURISDICTION.** Under a guardian's petition asking for an order to sell real estate, the court does not have jurisdiction to make an order authorizing the guardian to mortgage it. *Id.*
10. **FORECLOSURE: JUNIOR LIEN.** Where a mortgage has been foreclosed in an action to which a junior lien-holder has not been made a party, the purchaser under the foreclosure proceeding may prosecute an action requiring the junior lien-holder to exercise his right of redemption, and in default thereof is entitled to a decree cutting off such right of redemption. *Shaw v. Heisey et al.*, 468.
11. **EXECUTION: JUDICIAL SALE.** The interest sold under execution in a foreclosure proceeding is the entire interest covered by the mortgage, unaffected by any subsequent conveyance of the mortgagor. *Id.*

See HOMESTEAD, 6.

HOMESTEAD ACT, 1, 2.

JUDICIAL SALE.

MECHANIC'S LIEN, 1, 5, 6.

#### MUNICIPAL CORPORATION.

1. **IMPROVEMENT OF STREET: ASSESSMENT.** Under section 466 of the Code, cities are authorized to pass an ordinance assessing upon a corner lot the cost of macadamizing one-fourth of the square formed by the intersection of the streets. *ADAMS, J., dissenting. Wolf v. The City of Keokuk*, 129.
2. **POWER TO LICENSE.** While the exclusive power conferred upon a city to grant a license does not authorize it to grant an exclusive license, yet such power is conferred when it is authorized to grant or refuse a license. *Burlington and Henderson County Ferry Company v. Davis*, 133.
3. **—: FERRY.** It is competent for the Legislature to confer upon a city the right to grant an exclusive license to ferry across the Mississippi river. *Id.*

See TAXATION, 1.

#### NEGLIGENCE.

1. **PRESUMPTION OF: CARE REQUIRED.** Proof of the occurrence of an accident which, under ordinary circumstances, would not have happened if due care had been exercised, raises a presumption of negligence, and to rebut this presumption the defendant must show that in the selection and operation of the machinery which caused, or contributed to, the accident, he used due care, skill, and prudence, but he is not required to furnish a satisfactory explanation of the cause of the accident to relieve himself from liability. *Tuttle v. The O. R. I. & P. R. Co.*, 236.

2. **INJURY OF INFANT: RAILROADS.** The father of an infant injured by a railway train cannot recover of the company for loss of services and expenses incurred by reason of the injury if the negligence of the parents contributed thereto, unless, notwithstanding such negligence, the injury might have been avoided by the exercise of proper care by the company's employees. *Albertson v. The Keokuk & Des Moines R. Co.*, 292.

### NEW TRIAL.

1. **LOSS OF EVIDENCE: PRACTICE.** After trial and judgment, and an appeal therefrom had been perfected, all the written evidence upon which the case had been tried was lost, without fault of the appellant, who thereupon served a notice upon the other party and the clerk that he had withdrawn his appeal, and filed a petition for a new trial, which was granted: *Held*, that the new trial was improperly granted. *ADAMS, J., dissenting. Loomis v. McKenzie*, 416.
2. ———: **SUBSTITUTION OF.** Courts have the power to supply any part of their record which may have been lost, and this power exists independently of statute. In the exercise of their general equity powers they cannot grant relief by giving a new trial on account of lost evidence, when the law affords a plain and direct remedy by permitting the substitution of evidence. *Id.*
3. **PETITION FOR.** A petition for a new trial, under section 3155 of the Code, must be filed within one year from the date of the judgment or decree of the court in which the judgment or decree was rendered. *Gray v. Coan et al.*, 424.
4. ———. The time within which such petition must be filed commences to run from the date of the decree in the trial court, and not from the date of the affirmance of the decree in the Supreme Court. *Id.*

See PRACTICE, 6, 9, 10.

### NOTICE.

See FRAUDULENT REPRESENTATIONS, 5.

ORIGINAL NOTICE.

REFLEVIN, 1, 2.

TAX SALE AND DEED, 9.

### ORIGINAL NOTICE.

See JUDGMENT, 2, 6.

SCHOOL DISTRICT, 4.

### PARDON.

1. **POWER TO GRANT CONDITIONAL.** The Governor of the State has the power to annex to a pardon any condition precedent or subsequent, provided it be not illegal, immoral, or impossible to be performed. *Arthur v. Craig*, 264.

2. **REVOCATION OF.** Where a pardon was granted upon certain conditions, and it was stipulated therewith that upon any violation of such conditions the party pardoned should be liable to summary arrest, and to confinement in the penitentiary for the remainder of the term for which he had been sentenced, and it was further stipulated that the judgment of the executive should be conclusive as to the violation of the conditions of the pardon, *held*, that upon the violation of the conditions of the pardon, the legal status of the party became the same as it was before the pardon was granted. *Id.*

## PARENT AND CHILD.

1. **CUSTODY OF CHILD.** Where, upon the application of the father of an illegitimate child for the custody thereof, it appeared that his moral character was no better than that of the mother, and that she had a natural affection for the child, neither neglecting, abusing, nor failing to provide for it, it was *held*, that the custody of the child should not be awarded to him. *Pratt v. Nitz*, 33.

See **HOMESTEAD**, 2.

**NEGLIGENCE**, 2.

## PARTNERSHIP.

1. **PROMISSORY NOTE.** Defendant purchased certain cattle of plaintiff, supposing that they were the property of plaintiff and E. as copartners. At the request of E. he subsequently took up a note signed by both E. and the plaintiff as makers, although, in fact, plaintiff was but a surety. As a matter of fact, there was no copartnership existing between E. and the plaintiff. *Held* :

1. That E. and plaintiff were not bound to join in an action for the purchase price of the cattle.

2. That the defendant should have made inquiry whether in fact plaintiff was principal on the note.

3. That, there being no partnership in fact, defendant could not set off his payment of the debt of E. against the claim of plaintiff. *Enix v. Hays*, 86.

2. **AUTHORITY OF PARTNER: PROMISSORY NOTE.** If a firm is engaged to any extent in making collections, even though that may not be the principal business of the partnership, one of the partners may bind the firm by a promissory note given for a balance of money collected by it. *Van Brunt & Co. v. Mather et al.* 503.

## PATENT.

1. **VALIDITY: VENDOR AND VENDEE.** In the sale of a patent the patentee is not bound in the absence of fraud by any representation respecting the validity of the patent, nor has the vendee any right to rely upon such representation. *Rawson v. Harger*, 269.
2. **NOVELTY.** Nor can the vendee rely upon the representation of the patentee that his invention is novel, and that he is the original discoverer of the principle involved therein. *Id.*



3. **JURISDICTION.** Whether or not the State courts have jurisdiction to determine whether a machine which has been patented is novel, *quare. Id.*
4. **CONTRACT: EQUITABLE JURISDICTION.** If the fact of the novelty of the invention is equally unknown to both the parties to a contract for the sale thereof, or if each has equal means of information, equity will not interfere to relieve either from the obligations of his contract, where the parties thereto have acted in good faith. *Id.*

### PLEADING.

1. **ATTORNEY'S FEE.** Where a promissory note provided for "attorney's fees, and other costs and charges, if the same is not paid when due," it was *held*, in an action thereon, that an answer which put in issue a separate count, containing a claim for attorney's fees, did not also put in issue a count claiming on the note. *Musser v. Crum et al.*, 52.
2. ———: **COSTS.** The attorney's fees, when thus provided for in the notes, should be treated as a part of the costs, and the defendant was not therefore entitled to a jury. *SEEVERS and DAY, JJ., dissenting. Id.*
3. **REPLEVIN.** In an action of replevin an allegation by the defendant that he purchased the property in controversy of a third party is a sufficient denial of plaintiff's allegation of ownership. *Litchfield v. Halligan*, 126.
4. **EVIDENCE: VARIANCE.** In an action for damages for breach of a covenant of warranty, plaintiff alleged that he subsequently acquired title from the paramount owner, the Des Moines Valley Railroad Company: *Held*, that he could not be permitted to prove that he acquired his title from the Des Moines & Fort Dodge Railroad Company. *Burns et al. v. The Iowa Homestead Co.* 279.
5. **ANSWER: WAIVER OF.** The failure to answer a cross-petition cannot be taken advantage of on appeal, when the party filing it, instead of asking for a default, proceeds with the trial as though in fact the pleading had been answered. *Hervey v. Savery et al.*, 313.
6. **INTEREST.** Where a general demand for interest is made in the prayer of the petition, it is proper to include in the judgment interest not only to the time of the commencement of the action, but also up to the time when the judgment is rendered. *Dawson v. Graham*, 378.
7. **DEMURRER.** It is not competent to assail the paragraphs of a pleading by demurrer, the demurrer being proper only when it attacks the legal sufficiency of the whole pleading or a count thereof. *The Delaware County Bank v. Duncombe*, 488.
8. **STATEMENT OF CAUSE OF ACTION.** Under the Code the same cause of action may be stated in different counts and in different forms. *Van Brunt & Co v. Mather et al.*, 503.

See **CONTRACTS**, 5.

**CRIMINAL LAW**, 12, 13, 16, 17.

**JURISDICTION**, 1.

**PRACTICE**, 18, 19, 20.

**VERIFICATION**.

## PRACTICE.

1. **FINDING OF COURT.** The finding of a court stands as the verdict of a jury, and will not be disturbed unless there is such want of testimony to support it as to raise the presumption that it is not the result of an unprejudiced and honest exercise of discretion. *Vogel & Bro. v. Wadsworth*, 28.
2. **SETTING ASIDE OF DEFAULT.** The court below may impose the conditions upon which it will set aside a default, and its action therein will not be reviewed unless an abuse of discretion is shown. *Blough v. Van Hoorbeke*, 40.
3. **COUNTER-CLAIM: FORMER ADJUDICATION.** Where a counter-claim is embraced in the issue at the time of final submission and judgment, the plaintiff is entitled to immunity from any further action thereon. *Gunsaulis v. Cadwallader*, 48.
4. **DEFAULT: ADMINISTRATOR.** Where one of four executors resigned, it was held, that service of notice upon him eight months after his resignation, in an action against the executors as such, conferred no jurisdiction to enter judgment by default. *The United States Rolling Stock Co. v. Potter*, 56.
5. **CERTIFICATE OF JUDGE: BILL OF EXCEPTIONS.** A certificate of the trial judge, made a year after the trial, to the effect that the evidence contained in the abstract was all the evidence submitted upon the trial, is not a compliance with the statute, and the bill of exceptions may be stricken from the record upon motion. *Gibbs v. Buckingham*, 96.
6. **CHANGE OF VENUE: NEW TRIAL.** Pending an application for a new trial upon the ground of newly discovered evidence, made subsequent to the trial term, a change of venue may be granted upon a proper showing therefor. *Id.*
7. **TRIAL ANEW.** Where on appeal it was determined that the appellant was not entitled to a trial *de novo*, but the cause was determined upon the errors assigned, and the decree was reversed, a *procedendo* in the usual form issuing to the court below, the appellant was not entitled upon the remand to a judgment, but the cause stood for a trial anew like a law action, notwithstanding it may have involved an equitable issue. *Jordan v. Winser and Snyder*, 181.
8. **SIGNING INSTRUCTIONS.** The Statute (Code, § 4440) requiring that the instructions be signed by the judge is directory, and the failure to comply therewith will be held to be error only when the party complaining is prejudiced thereby. *The State v. Stanley*, 221.
9. **NEW TRIAL: TIME FOR MOTION.** The consent entered of record extending the time for filing a motion for a new trial, in the absence of any stipulation as to what causes shall be included in the motion, has the effect to extend the time for all causes for which at any time a motion may be filed. *Eckel v. Walker et al.*, 225.
10. ———: **NEWLY DISCOVERED EVIDENCE.** Facts considered which were held to constitute reasonable diligence in procuring newly discovered evidence. *Id.*
11. **FINDING OF COURT.** The finding of a court stands as the verdict of a jury, and will not be disturbed unless clearly unsupported by the testimony. *Knox v. Hanlon*, 252.

12. **FORM OF ACTION.** Where several parties had commenced actions against a common defendant to enforce mechanics' liens, it was *held* to be competent for plaintiff and defendant, by agreement, to have united therewith an ordinary action at law, prosecuted by ordinary proceedings. *Hines v. The Whitebreast Coal and Mining Company*, 236.
13. **CROSS-PETITION: AFFIRMATIVE RELIEF.** While no affirmative relief can be afforded the defendant unless it is claimed in a cross-petition, yet where such relief has been granted in the court below, without objection, the decree will not, for that reason, be reversed on appeal. *Kellogg & Harris v. Aherin and McGann*, 299.
14. **CONTEMPT.** A witness who is in contempt may be arrested upon a warrant directing the arrest in vacation, but the court may also order his discharge by the officers intrusted with the writ, upon bail fixed by the court. These proceedings, however, are authorized only in a case of actual contempt, and when necessary to the proper administration of justice. *The State v. Archer*, 310.
15. **OPENING DEFAULT: AFFIDAVIT OF MERITS.** Upon an application to open a default, an affidavit alleging that the defendant has a "good and substantial defense upon the merits" is not sufficient. The affidavit should state the facts constituting the defense. *King v. Stewart*, 334.
16. ———: **ANSWER.** Unless the affidavit sets out the facts constituting the defense, it is not error to refuse to grant the application and permit an answer to be filed. *Id.*
17. **OPENING AND CLOSING.** Where it is apparent that upon the principal and material issues the defendant has the burden of proof, the action of the court in giving him the opening and close of the case cannot be assigned as error. *The Delaware County Bank v. Duncombe*, 488.
18. **PLEADING: SUFFICIENCY OF.** An objection to the sufficiency of a pleading cannot be made for the first time in an instruction to the jury; it must be raised by motion, demurrer, pleading, or motion in arrest of judgment. *McIntire v. McIntire*, 511.
19. **FILING OF PETITION.** If a petition be not filed by the date fixed in the notice, the action is to be deemed discontinued. *Cibula et al. v. Pitts' Sons' Manufacturing Co.*, 528.
20. ———: **APPEARANCE.** The appearance of the defendant for the purpose of presenting a motion to discontinue the cause will not waive the defect resulting from the failure to file the petition in time. *Id.*
21. **AFFIDAVITS OF JURORS.** Affidavits of jurors may be received for the purpose of showing that the amount of the verdict was reached by dividing the sum of the amounts suggested by all the jurors by twelve. *Darland v. Wade*, 547.
22. **REMITTITUR.** Where a quotient verdict was rendered it was *held* that the court was not authorized to accept a *remittitur* of all but the lowest amount which any juror was disposed to give, and render judgment for that amount. *Id.*
23. **CERTIFICATE OF JUDGE: APPEAL.** The certificate of the trial judge contemplated by section 3173 of the Code must be made before the

adjournment of the term at which the judgment was rendered. *The City of Independence v. Purdy*, 675.

See ATTACHMENT, 5, 6.

CRIMINAL LAW, 8.

EVIDENCE, 2.

INJUNCTION.

INSURANCE, 4.

NEW TRIAL, 1, 3, 4.

TAX SALE AND DEED, 11.

### PRACTICE IN THE SUPREME COURT.

1. **APPEAL.** The Supreme Court has no general original jurisdiction, and cannot order that an appellee shall proceed no further with a cause. An appellant who deems that the appellee has, pending the appeal, deprived himself of his rights thereunder, has the alternative of dismissal of his appeal, or of a final submission upon the merits thereof. *Simonson v. The U. R. I. & P. R. Co.*, 19.
2. **TRIAL.** A case tried as a chancery case in the court below will be reviewed in the Supreme Court under the rules and practice applicable to equity causes, regardless of the character of the case, and of the relief sought. *Blough v. Van Hoorebeke*, 40.
3. **TRIAL DE NOVO: EVIDENCE.** Upon the trial *de novo* of a case on appeal, questions involving the competency and admissibility of witnesses come up as original questions upon the objections made on the trial below, and are not passed upon in review of the decision of the inferior court. *Id.*
4. ———. In the absence of a motion and order that the case be tried upon written evidence, an express agreement must be shown that it be so tried to entitle the parties to a trial *de novo* on appeal. *Saunders v. Halliday et al.*, 81.
5. **PRESUMPTION.** It will be presumed, in the absence of evidence to the contrary, that an order of the court below was sustained by sufficient proof. *Thompson et al. v. Winnebago County et al.*, 155.
6. **TRANSCRIPT.** Advantage can be taken of a failure to file a transcript, in the absence of an agreement to waive it, only by a motion to dismiss or affirm. *Holmes v. Hull et al.*, 177.
7. **ASSIGNMENT OF ERRORS.** An appeal will be dismissed if the assignment of errors is not served on the appellee ten days before the first day of the trial term. Whether or not it must be filed with the clerk previous to the day devoted to consideration of causes from the district whence comes the appeal, *quære*. *Independent District of Crocker v. Independent District of Ankeny*, 206.
8. **RECORD.** A motion to dismiss an appeal on the ground that the record of the court below was not properly made, will not be sustained. *Duffee v. Sherman et al.*, 287.

9. **TRIAL DE NOVO.** The consent of parties to the entry of an order in the court below, that a case be tried upon written evidence, obviates the necessity for a motion for that purpose, and entitles either party to a trial *de novo* in the Supreme Court. *Robinson v. The First National Bank of Cedar Rapids*, 354.
10. **ASSIGNMENT OF ERRORS.** When the record fails to disclose that the ruling objected to in the assignment of errors was made, the judgment of the court below will be affirmed. *Borland v. McNally*, 440.
11. **ABSTRACT.** If the abstract fails to show that it contains all the testimony, the judgment will not be disturbed because it is not sustained by the evidence. *Id.*
12. **TRIAL DE NOVO.** To entitle the appellant to a trial *de novo* in the Supreme Court the provisions of section 2742 of the Code must be complied with. If they are not, the case will be reviewed on appeal only upon the errors assigned. *Twogood & Elliott v. Reilly et al.*, 546.
13. **EXCEPTIONS TO INSTRUCTIONS.** When the defendant fails to except to the instructions of the court, relying upon a practice that all instructions given are regarded as excepted to, the practice should be stated in the abstract to be of avail to appellant. *Steyer v. Curran et al.*, 580.

See EVIDENCE, 3.

INSTRUCTION, 1, 2.

PRACTICE, 1.

#### PRINCIPAL AND AGENT.

See ATTORNEY, 3.

CONTRACTS, 2.

FRAUDULENT REPRESENTATIONS, 5, 6.

INSURANCE, 2.

STATUTE OF FRAUDS, 1.

#### PROMISSORY NOTE.

1. **CONTRACT TO EXECUTE.** Where a party enters into a contract to execute a promissory note, and subsequently executes the note in accordance with the terms of the contract, a money judgment cannot be recovered against him in an action on the contract to execute the note. *Lister v. Clark et al.*, 168.
2. —: **EVIDENCE.** A copy of the contract furnished to the payee by the maker of the note, and at his request, was *held* not admissible as an admission that the note had been changed by parol. *Id.*
3. —: **MODIFICATION OF.** The written contract not providing for a note with a stipulation for attorney's fees, it was competent for the parties to change its terms by parol so that the maker should be liable for attorney's fees, and the payee should change the date from which interest should commence to run. *Id.*

4. **WHEN VALID ON ITS FACE.** A note executed on Sunday, but dated upon a week day, is valid in the hands of a *bona fide* purchaser for value before maturity. *The Clinton National Bank v. Graves et al.*, 228.

See **FRAUDULENT REPRESENTATIONS**, 5, 6.

**MORTGAGE**, 2, 4.

**PARTNERSHIP**, 1, 2.

**PLEADING**, 1, 2.

**RES ADJUDICATA**, 3.

**SURETY**, 2, 3, 4.

### PUBLIC LANDS.

1. **PRE-EMPTION.** A person claiming under the pre-emption law must make an actual settlement in person, and he cannot recover damages from one whom he has employed to make improvements, and who, in violation of the conditions of his employment, has acquired for himself a homestead in the land. *Walker v. Stone*, 92.

### RAILROADS.

1. **PRIVATE CROSSING.** A railroad company whose line runs through the land of an owner is only required to provide a crossing for such owner when his interest and convenience require it. *Henderson v. The C., R. I. & P. R. Co.*, 216.
2. **JUDGMENT FOR PERSONAL INJURIES: LIEN.** Section 1309 of the Code, making judgments for personal injuries prior to the liens of mortgages and trust deeds, cannot be extended to embrace claims for such injuries, even though actions therefor be pending, and the purchaser of a railroad takes it free from such claims, unless the same have been prosecuted to judgment. *The B. C. R. & N. R. Co. v. Verry et al.*, 458.
3. **SHIPMENT OF STOCK: DELAY IN.** Where the stock to be shipped by plaintiff was not loaded upon the arrival of the defendant's train, and was not even in the yards of the company, but in a private yard, and had not been given into the possession of any authorized agent of defendant, it was *held* that defendant was not liable for refusing to delay the train until the stock could be loaded, notwithstanding the same train took cars of stock at other stations later, although in these instances the locomotive was required to assist in loading the cars, while in plaintiff's case it was not. *Frazier & Cooper v. The K. C. St. J. & C. B. Ry. Co.*, 571.

See **MECHANIC'S LIEN**, 4, 5, 6.

**NEGLIGENCE**, 2.

**TAXATION**, 8, 9, 10.

### RECEIVER.

1. **CORPORATION.** In an action by a receiver to recover from a stockholder an assessment upon his unpaid stock, he cannot set up, as a defense, fraud in procuring the appointment of the receiver, or the claim that

the corporation is not indebted, these matters being adjudicated in the action resulting in the appointment of the receiver. *Schoonover v. Hinckley*, 82.

2. **POWERS OF.** An order of court appointing a receiver of a railroad company provided that he should "do and perform all the acts and things necessary to be done and performed to construct and complete said line of railroad," and that he should be authorized to borrow such sums of money as were necessary for the further construction, equipment, and final completion of the road, and to issue his debentures or certificates therefor, and that such certificates, "whether for money borrowed, material furnished, labor performed, or on account of contracts made by him on account of the construction of the road," should be treated as receiver's indebtedness, and constitute a first lien on the road: *Held*, that the receiver was not authorized to issue certificates in payment of material until it had been furnished, and having issued his certificates for material contracted to be delivered, but which in fact never was, such certificates were void. *The Bank of Montreal v. The C. C. & W. R. Co. et al.*, 518.
3. ———: **NEGOTIABILITY.** Such certificates reciting upon their face that they were issued under an order of court, the holder was chargeable with notice of the order, and in taking them was bound to inquire whether the receiver had power to issue them in payment for material to be delivered at a future time. *Id.*

#### RECORD OF JUDGMENT.

1. **DESTRUCTION: COSTS.** The costs in a proceeding to restore the record of a judgment which had been destroyed, if the motion is resisted and is sustained by the court, should be taxed against the losing party. *Kanke & McKinley v. Herrum et al.*, 276.
2. **JURISDICTION.** In such a proceeding the only questions for determination are the prior record of the judgment, and its destruction. The regularity of the judgment or its validity cannot be inquired into therein. *Id.*

#### REPLEVIN.

1. **EXECUTION: NOTICE.** An action to recover possession of specific personal property cannot be maintained against a sheriff who holds it by virtue of an execution, unless the plaintiff, prior to the commencement of the action, gives written notice of his ownership of the property. *Peterson v. Espeset*, 262.
2. ———: ———. The fact that plaintiff's title and right of possession appeared of record would not relieve him from the necessity of giving notice. *Id.*

See **PLEADING**, 3.

#### RES ADJUDICATA.

1. **JUDGMENT UPON DEMURRER.** A judgment upon demurrer is a bar to another action between the same parties upon the facts, the sufficiency of which was put in issue by the demurrer. *Felt v. Turnure et al.* 397.

2. **SPECIFIC PERFORMANCE.** Where, in an action to compel specific performance of a contract, it had been determined that the plaintiff was not entitled thereto, *held* that the contract could not be set up as an equitable defense in an action to recover possession of the land which constituted the subject-matter of the contract. *Painter v. Hogue*, 426.
3. **PROMISSORY NOTE.** C. commenced an action, aided by attachment, upon an account and note, and asked that, if the attached property sold for more than enough to satisfy the claim in controversy, the balance be held, to apply upon another note of defendant held by him. The defendant admitted the execution of the notes, and claimed damages for the wrongful suing out of the attachment. There was a trial, and judgment for defendant: *Held*, in a subsequent action upon the second note, that the note was not in issue, and did not constitute a cause of action in the former suit. *Crum v. Boss et al.*, 433.
4. **EVIDENCE.** Under an issue of former adjudication, evidence is not admissible to show what action was taken by the jury, or what matters were considered by them. *Id.*
5. **PARTITION: LIEN OF HEIR.** The partition of the lands of an ancestor among his heirs, in a proper proceeding therefor, is an adjudication of all rights in or claims to a lien of all of the heirs for any purpose upon the lands so partitioned. *Jones v. Brown et al.*, 568.

See PRACTICE, 3.

#### REWARD.

1. **POWER OF COUNTIES TO OFFER.** It is not within the power of a county to offer a reward for the arrest of persons charged with the commission of a crime, but the board of supervisors may offer a reward for the recovery of money which has been stolen from the county. *Hack v. Marion County*, 472.
2. ——— : **PRO RATA PAYMENT.** Where a portion of the stolen money has been recovered, the party through whose agency the recovery has been effected is entitled to a *pro rata* share of the reward. *Id.*
3. ——— : **RATIFICATION.** The fact that the board were not in session when they determined to offer the reward would not defeat the right of the party entitled thereto, if by their subsequent acts they ratified the offer. *Id.*

#### SALE.

1. **CONTRACT FOR DISEASED STOCK: WHEN VOID UNDER STATUTE.** Under section 4055 of the Code, a contract for the sale of sheep, known by the seller to be affected with a contagious disease, cannot be enforced, even when the purchaser has knowledge of the diseased condition of the sheep at the time of the purchase; the object of the statute being to prevent traffic in diseased animals, for the protection not only of the purchaser, but of the public. *Caldwell v. Bridal*, 15.
2. ——— : **KNOWLEDGE OF NATURE OF DISEASE.** If, however, the seller is not aware that the disease with which the sheep are affected is contagious, the statute will not apply, being limited by its terms to the sale of sheep known to be affected with a contagious disease. *Id.*



3. ———: **FRAUDULENT CONCEALMENT.** The fact that the seller kept the diseased portion of the flock separate from the remainder, and did not show them to the buyer, would not vitiate the sale if the latter obtained knowledge of the diseased condition of the sheep before completing the purchase. *Id.*

See **PATENT**, 1.

### SCHOOL DISTRICT.

1. **ORGANIZATION OF INDEPENDENT DISTRICT.** Where the board of directors had in due form created a sub-district, and then a vote was obtained in such sub-district in favor of an independent organization, it was held that the fact that a sub-director had not been elected before the organization of the independent district did not invalidate such organization. *Independent School District No. 8 of Burr Oak Township v. Independent School District of Burr Oak*, 157.
2. **ACT OF LEGISLATURE.** An act of the Legislature curing an informality in the election at which the question of organizing an independent district was submitted, would not have the effect to change or modify the boundaries of such independent district. *Id.*
3. **APPORTIONMENT OF JUDGMENT: CERTIORARI.** Where an action was instituted upon a school order of a district township which had been subsequently reorganized into independent districts, the District Court had jurisdiction to render judgment thereon against the several independent districts, and to issue a *mandamus* commanding the directors to assemble and apportion the amount of the judgment among the several judgment debtors. *Certiorari* would not lie to the District Court upon the ground that it had exceeded its jurisdiction. *The Independent School District of Albany v. The District Court for Dubuque County*, 180.
4. **OFFICER.** The treasurer of a school district is an officer thereof, and service of an original notice upon him in an action against the district constitutes service upon the district. *Kennedy v. The Independent School District of Derby Grange et al.*, 189.
5. **JUDGMENT AGAINST INDEPENDENT DISTRICTS: JURISDICTION.** Where the district organization had been abandoned, and the several sub-districts organized into independent districts, it was *held*, that an action in equity might be maintained against them upon a debt of the district, and that the District Court had jurisdiction to render judgment thereon, and to issue a writ of *mandamus* commanding the directors of the independent districts to apportion the amount of the judgment among them. *Held*, further, that the apportionment thus made did not conclude any district, but that it might maintain an action against the others for contribution. *Id.*

### SCHOOL FUND.

1. **BOARD OF SUPERVISORS.** The board of supervisors may make such reasonable rules for the loaning of the school fund as to them shall seem proper, and among others, may provide that the fund shall only be loaned to residents of the county. *Emmet County v. Skinner et al.*, 244.

2. **FORECLOSURE.** In an action by the county to foreclose a school fund mortgage, the fact that the defendant, who was the grantee of the mortgagor, had paid the interest and made application to the auditor for a loan equal to the amount of the mortgage, was *held* to constitute no defense to the action. *Id.*

## SHERIFF.

1. **SERVICES OF JAILER.** The sheriff who employs a jailer, and not the county, is liable for payment for his services. *McDonald v. Woodbury County*, 404.
2. **COMPENSATION OF.** The salary provided by law to be paid the sheriff is intended as a full compensation for all services for which payment is not otherwise provided, and he cannot recover for services he may render as jailer. *Id.*

## STATUTES CITED, CONSTRUED, ETC.

## CODE OF 1851.

- Sec. 1618. Attorney's lien. *Cowen v. Boone et al.*, 352.
- " 1699. Costs. *Vance v. Fall*, 365.
- " 1715. Original notice. *Bond v. Epley*, 605.
- " 2518. Original notice. *Bond v. Epley*, 605.

## REVISION OF 1860.

- Sec. 29. Construction of statute. *Wolf v. The City of Keokuk*, 132.
- " 748. Taxation. *Harwood v. Brownell*, 666.
- " 779. Tax sale. *Gibbs v. Sawyer*, 443.
- " 784. Tax deed. *Robinson v. The First National Bank of Cedar Rapids*, 357.
- " 790. Tax deed. *Barrett v. Love*, 106, *et seq.*
- " 822. Bridges. *Mallory v. Montgomery County*, 690.
- " 1329. Railroads. *Henderson v. The C., R. I. & P. R. Co.*, 220.
- " 1855. Mechanic's lien. *Brodt v. Rohkar et al.* and *Wilson et al.*, 38; *Bear v. The B., C. R. & M. R. Co.*, *et al.*, 632.
- " 2435. Dower. *Kyne et al. v. Kyne et al.*, 24.
- " 2607. Husband and wife. *Jones v. Glass et al.*, 345.
- " 2653. Guardian. *McMannis et al. v. Rice*, 363.
- " 2706. Attorney's lien. *Cowen v. Boone et al.*, 352.
- " 2746. Statute of Limitations. *Davis v. Harper*, 514.
- " 2812. Original notice. *Bond v. Epley*, 605.
- " 3127. Practice. *Gunsauls v. Cadwallader*, 51.
- " 3130. Offer. *Gunsauls v. Cadwallader*, 51.
- " 3601. Action to quiet title. *Barrett v. Love*, 107, *et seq.*
- " 3778. Injunction. *Anderson v. Hall et al.*, 348.
- " 4183. Mechanic's lien. *Brodt v. Rohkar et al.* and *Wilson et al.*, 38.
- " 4771. Jury. *The State v. Bruce*, 536.

## CODE OF 1873.

- Sec. 50. Repeal of statute. *Brodt et al. v. Rohkar et al.* and *Wilson et al.*, 39.
- " 58. Reward. *Hawk v. Marion County*, 474.
- " 161-162. Jurisdiction. *Kenston v. Hewitt et al.*, 679.
- " 180. Practice. *King v. Stewart*, 335.
- " 196. Record. *Loomis v. McKenzie*, 420.
- " 215. Attorney's lien. *Cowen v. Boone et al.*, 352.
- " 279. Counties. *Hawk v. Marion County*, 474.
- " 283-285. County seat. *Duffes v. Sherman et al.*, 290.
- " 303. Boards of supervisors. *Hawk v. Marion County*, 474.
- " 393. Fences. *Duffes v. Judd*, 280.
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- " 536. City marshal. *Christ v. Polk County*, 304.
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- " 797, 801, 807, 810, 813, 821, 823, 831. Taxation. *In the matter of the appeal of the Des Moines Water Company*, 329, *et seq.*
- " 812. Taxation. *Richards v. Wapello County*, 506.
- " 845. Taxation. *Harwood v. Brownell*, 663.
- " 870. Taxation. *Richards v. Wapello County*, 509.
- " 889, 894, 896, 897, 898. Tax sale. *Robinson v. The First National Bank of Cedar Rapids*, 357.
- " 891. Tax sale. *Harman v. Anderson*, 310.
- " 902. Tax deed. *Barrett v. Love*, 106, *et seq.*
- " 960. Highway. *Spurrler v. Wirtner*, 487.
- " 1184, 1185, 1186, 1187. Building Associations. *The Hawkeye Benefit and Loan Association v. Blackburn et al.*, 389.
- " 1229. Mines. *Ahern v. The Dubuque Lead & Lavel Mining Company et al.*, 141.

- Sec. 1309. Railroads. *The B. C. R. & N. R. Co. v. Verry et al.*, 460.
- " 1446, et seq. Live stock. *Duffee v. Judd*, 238.
- " 1447, 1450. Damages. *Crawford v. Williams*, 319.
- " 1539. Intoxicating liquors. *The State v. Cornan*, 568.
- " 1558. Homestead. *Collins et al. v. Chantland et al.*, 243.
- " 1718. School district Independent School District No. 8, of Burr Oak Township v. Independent School District of Burr Oak, 162.
- " 1796. School district. Independent School District No. 8, of Burr Oak Township. v. Independent School District of Burr Oak, 161.
- " 1815, 1820. School districts. Independent School District No. 8, of Burr Oak Township. v. Independent School District of Burr Oak, 162.
- " 1860, 1871, 1881. School fund. *Emmet County v. Skinner et al.*, 245.
- " 1922. Sale. *King v. Godfrey*, 703.
- " 1928. Possession. *Barrett v. Lore*, 111.
- " 1940. Vendor's lien. *Jordan v. Winsor and Snyder*, 181.
- " 1988, 1992. Homestead. *Moninger & Ringland v. Ramsey*, 363.
- " 1993. Homestead. *Wilson v. Hardesty*, 517.
- " 2007, 2008. Homestead. *Whitehead v. Conklin et al.*, 479.
- " 2008. Homestead. *Moninger & Ringland v. Ramsey*, 363.
- " 2077, 2078. Interest. *The Hawkeye Benefit and Loan Association v. Blackburn et al.*, 390.
- " 2081. Usury. *Culver v. Wilbern Bros.*, 28.
- " 2130, 2137, 2139, 2141. Mechanic's lien. *Bear v. The B. C. R. & M. R. Co. et al.*, 627 et seq.
- " 2131, 2133. Mechanic's lien. *Cutler & Parker v. McCormick, Hall & Porter*, 411.
- " 2202. Husband and wife. *Van Doran v. Marden*, 188.
- " 2214. Husband and wife. *Jones v. Glass et al.*, 345.
- " 2220. Divorce. *Fletcher v. Groves*, 702.
- " 2301. Parent and child. *Pratt v. Nitz*, 35.
- " 2347. Executor. *The United States Rolling Stock Co. v. Potter*, 66.
- " 2418, 2420. Estates. *Knox v. Hanlon*, 256.
- " 2440, 2441. Dower. *Whitehead v. Conklin et al.*, 479; *Wilson v. Hardesty*, 517; *Rausch v. Moore*, 615.
- " 2510. Mechanic's lien. *Brodt v. Rohkar et al. and Wilson et al.*, 39; *Hines v. The Whitebreast Coal Mining Co.*, 288.
- " 2529. Statute of limitations. *Barrett v. Lore*, 110; *Harwood v. Brownell*, 663.
- " 2565. Minor. *Vance v. Fall*, 364.
- " 2589. Change of venue. *Anderson v. Hall et al.*, 348.
- " 2591. Change of venue. *Schaentgen v. Smith*, 360.
- " 2599. Original notice. *Bond v. Epley*, 606.
- " 2600. Practice. *Cibula et al. v. Pitts' Sons' Manufacturing Co.*, 528.
- " 2612. Service. *Kennedy v. The Independent School District of Derby Grange et al.*, 191.
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- " 2650. Practice. *McIntire v. McIntire*, 512.
- " 2673. Pleading. *Rausch v. Moore*, 612.
- " 2729. Pleading. *Doud v. Walter*, 633.
- " 2740. Practice. *Musser v. Crum, et al.*, 55.
- " 2741, 2742. Practice in the Supreme Court. *Twogood & Elliott v. Rellly et al.*, 546.
- " 2742. Trial. *Blough v. Van Hoorebeke*, 41. Practice in the Supreme Court. *Knox v. Hanlon*, 254; *Gow et al. v. Tidrick*, 285; *Robinson v. The First National Bank of Cedar Rapids*, 356; *Bortland v. McNally*, 442; *Fletcher v. Groves*, 700. Records. *Loomis v. McKenzie*, 420.
- " 2789. Exceptions. *Steyer v. Curran et al.*, 581.
- " 2808. Verdict. *The State v. Ridley and Johnson*, 374.
- " 2831. Bill of exceptions. *Gibbs v. Buckingham*, 98.
- " 2837. New trial. *Loomis v. McKenzie*, 419.
- " 2838. Practice. *Clinton National Bank v. Graves et al.*, 231.
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- " 2847. Offer. *Gunsaulis v. Cadwallader*, 51.
- " 2856. Pleading. *Musser v. Crum, et al.*, 55.
- " 2871. Practice. *Blough v. Van Hoorebeke*, 42; *The United States Rolling Stock Co. v. Potter*, 67; *King v. Stuart*, 281.
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- " 2933. Costs. *Kanke & McKinley v. Herrum et al.*, 277; *Howder v. Overholser*, 353.
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- " 3027. Execution. *Anderson v. Hall et al.*, 347.
- " 3055. Notice. *Peterson v. Espeet*, 362.
- " 3072. Exemptions. *Holden v. Stranahan*, 71.
- " 3154. New trial. *Loomis v. McKenzie*, 418.
- " 3154, 3157. New trial. *Gray v. Coan et al.*, 424.
- " 3154, 3157. Judgment. *Bond v. Epley*, 604.
- " 3156. New trial. *Gibbs v. Buckingham*, 98.
- " 3164. Appeal. *Cowen v. Boone et al.*, 352.
- " 3168. Justice of the peace. *Holmes v. Hull et al.*, 180.
- " 3170. Practice. *Fletcher v. Groves*, 701.
- " 3173. Appeal. *The City of Independence v. Purdy*, 678.
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 " 3568. Judgment. *Anderson v. Hall et al.*, 347.  
 " 3575, 3590. Appeal. *In the matter of the appeal of the Des Moines Water Company*, 332.  
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 " 3789. Sheriff. *McDonald v. Woodbury County*, 405.  
 " 3837. Fees. *Doughty v. Paige*, 485.  
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 " 4065. Disposed stock. *Caldwell v. Bridal*, 16, 18.  
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 " 10. Railroad tax. *Harwood v. Brownell*, 664.  
 " 45. Secs. 1, 2. Cities. *Wolf v. The City of Keokuk*, 131.  
 " 50. Railroad tax. *Harwood v. Brownell*, 664.  
 " 102. Railroad tax. *Harwood v. Brownell*, 664.  
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 " 70. Stock. *Duffee v. Judd*, 258.

LAWS OF 1876.

Chap. 100. Mechanic's lien. *Brodt v. Rohkar et al. and Wilson et al.*, 39.

STATUTE OF FRAUDS.

1. AGENT. Where the owner of real estate wrote to his agent that he would sell the same at a price named, whereupon the plaintiff agreed to purchase, it was *held*, that the possession of the letter by the agent was not sufficient to take the case out of the operation of the statute of frauds. *Steele & Son v. Fife et al.*, 99.
2. POSSESSION OF WRITING. The execution of a deed without delivery, in such sense that the grantee acquires control of it, does not constitute a compliance with the statute, even though the grantee may temporarily have it in his possession. *Id.*

## STATUTE OF LIMITATIONS.

1. **ADVERSE POSSESSION.** To entitle the owner of wild lands to the protection of the statute of limitations, his possession thereof must have been visible, actual, notorious, and hostile. It is not enough that he has paid the taxes thereon, and occasionally looked at and shown them to others as his own. His possession must have been such as to indicate a hostile claim thereto. *Brown v. Rose*, 231.
2. **WHEN ACTION IS BARRED IN ANOTHER STATE.** Under the Revision, when a personal action has become fully barred by the laws of any other country or State in which the defendant has resided, such bar will constitute a defense to the action in this State, and this is true whether or not the cause of action arose in this State. *Davis v. Harper*, 513.

See ADVERSE POSSESSION.

TAXATION, 8.

TAX SALE AND DEED, 2, 4, 5, 10.

## STOCK.

1. **DAMAGE BY: PARTITION FENCE.** The fact that stock is prohibited from running at large in a county does not relieve the land owner from the duty of maintaining partition fences, and if he suffer damage resulting from his neglect of his fences, he cannot recover therefor from the owner of the stock causing the damage. *Duffee v. Judd*, 256.
2. **APPEAL: JURISDICTION.** Upon an appeal from an assessment of damages by the township trustees, not only the amount of damages awarded by the trustees, but also the question as to whether the claimant is entitled to damages at all, may be considered. *Id.*

See DAMAGES, 1, 2.

LANDLORD AND TENANT.

RAILROADS, 3.

SALE, 1, 2, 3.

## SUNDAY.

See DAMAGES, 4.

PROMISSORY NOTE, 4.

## SURETY.

1. **BAIL: EFFECT OF ARREST.** When a person is held to answer a criminal charge by a justice of the peace, and an indictment is subsequently found against him, whereupon the court directs a warrant to issue for his arrest, the surety is discharged when the arrest is made, and the party indicted is taken into custody. *The State v. Orsler*, 343.

2. **CONSIDERATION: PROMISSORY NOTE.** To bind a surety upon a promissory note, who signed the same subsequent to the execution thereof by the principal and acceptance by the payee, and at the request both of payee and principal, some new consideration must be established, either of advantage to the signers of the note, or of prejudice to the payee. *Briggs & Downing v. Matthews et al.*, 550.
3. **PARTIAL PAYMENT.** Where a party became surety for one-third of a debt, and another party became surety for two-thirds thereof, a part of which was subsequently discharged by the payment of a portion of a judgment recovered thereon, *held*, that neither of the sureties could insist upon the application of the entire amount paid to the release of his liability. *Doud v. Waller*, 634.
4. ———: **PROPORTION OF LIABILITY.** The amount so recovered and paid should be deducted from the entire debt, whereupon the sureties would be liable for the remainder, in the proportion of their liability upon the original debt. *Id.*

See **USURY**, 1.

## SWAMP LANDS.

See **CONTRACTS**, 3.

## TAXATION.

1. **CORPORATION: MUNICIPAL CORPORATION.** A water company, which supplies the city with water, whose rates are regulated by the city council, and which, by the terms of the ordinance conferring its powers, may be purchased at a fixed price by the city, is, nevertheless, a private corporation, and its property is subject to taxation. *In the Matter of the Appeal of the Des Moines Water Company*, 324.
2. ———: **EXTINCTION OF FIRES.** Nor is its property exempt from taxation by section 797 of the Code, since its primary and exclusive use is not for the extinction of fires. *Id.*
3. ———: **ASSESSMENT.** The real and personal property of such a corporation may be assessed to the company, and must be so assessed when the shares of the company have not been assessed. *Id.*
4. ———: ———. The land, buildings, machinery and water mains are all real estate, and the mains are subject to assessment in the township where the machinery which propels the water through them is situated. *Id.*
5. **EQUALIZATION: APPEAL.** Where an appeal is taken by the tax payer from an assessment fixed by the board of equalization, the amount of the assessment cannot be raised by the court to which the appeal is taken. *Id.*
6. **IMPROVEMENTS UPON REALTY.** Improvements upon real property, though made at the expense of the personal estate of the owner, and diminishing the amount of personalty subject to taxation, are not to be regarded as taxable property until the real estate is again assessed in the manner provided by law. *Richards v. Wapello County*, 507.

7. **RECOVERY OF UNAUTHORIZED PAYMENT.** Where a party has paid, under protest, taxes which should not have been assessed, and the board of supervisors has refused to refund the amount so paid, he may maintain an action at law for the recovery of his money. *Id.*
8. **IN AID OF RAILROADS; STATUTE OF LIMITATIONS.** *Mandamus* to compel the county treasurer to enter upon the tax books a tax voted in aid of a railway in 1868, but which was not certified up by the township trustees until 1876, would not be barred by the statute before three years after such certificate was made. Whether or not the statute of limitations would at any time operate to bar such a proceeding, *quære. Harwood v. Brownell*, 657.
9. ———: **EXTENSION ON TAX BOOK.** The validity of the tax did not depend upon its extension on the tax books in the year in which it was voted, and the fact that it was not so extended would not prevent it from being afterward entered thereon as an unpaid tax of a former year. *Id.*
10. ———: **WARRANT.** It was not necessary that the clerk of the board of supervisors should attach to the list furnished the treasurer a warrant requiring him to collect the taxes therein levied. *Id.*

#### TAX SALE AND DEED.

1. **DEED: POSSESSION: LICENSEE CANNOT ACQUIRE.** The licensee of real estate cannot acquire a tax title thereto as against his licensor, whose right of possession has continued for more than five years after the execution of the tax deed. *The Keokuk & Des Moines Railway Co. v. Lindley et al.*, 11.
2. ———: ———: **STATUTE OF LIMITATIONS.** The right to recover possession under a tax deed is barred in five years after the execution thereof. *Id.*
3. ———: **DEFECT IN TITLE: POSSESSION.** Even though there be defects in the title of the patent holder, he is nevertheless entitled to possession as against one claiming under a void tax title, when his possession is founded upon claim and color of title. *Id.*
4. ———: **STATUTE OF LIMITATIONS: WHEN ACTION BY PURCHASER IS BARRED.** Four years after the execution of a tax deed, the holder of the patent title took possession of the land, which was, up to that time, unoccupied prairie. After the expiration of five years from the recording of his deed, the tax purchaser brought an action to recover possession: *Held*, that he could not recover.
 

*Argument 1.* The statute of limitations commences to operate upon a tax deed at the time of the recording of the instrument, and the bar to an action to recover possession thereunder becomes complete at the expiration of five years.

*Argument 2.* Both patent owner and tax purchaser are to be regarded as continually claiming title from the time the deed is recorded, and neither has any right under the statute not enjoyed by the other.

*Argument 3.* It is within the province of the Legislature to provide that an action for the recovery of lands, held by the assent or sufferance of the owner, and not adversely, will be barred within a prescribed time, and section 902 of the Code is an exercise of this legislative authority. *ADAMS, J., dissenting. Barrett v. Love*, 103.

5. **SALE: STATUTE OF LIMITATIONS: RECOVERY OF TAXES.** An action by a tax purchaser for the recovery of the taxes paid by him upon land, whose title has been quieted in the patent owner, is barred in five years after the taxes become delinquent. *Sexton v. Peck*, 250.
6. —: **STATEMENT OF TREASURER: MISTAKE.** The fact that defendant's agent, sent to purchase a certain tract of land at tax sale, was informed by the treasurer through mistake that the taxes upon the land had been paid, was *held* not to avail defendant to defeat a tax title acquired by another to the land, where the defendant afterward purchased the land from the patent owner with knowledge of the tax sale, and before the expiration of the time for redemption thereof. *Gow et al. v. Tidrick*, 284.
7. —: **REDEMPTION.** The treasurer has no right to disregard the act of the auditor in permitting redemption from tax sale to be made, and after such redemption to execute a deed to the tax purchaser. *Hartman v. Anderson*, 309.
8. **DEED: OF WHAT CONCLUSIVE EVIDENCE.** Where the acts of assessment, listing and levy are admitted, a tax deed, based thereon, is conclusive evidence that the manner of their performance was according to law. *Robinson v. The First National Bank of Cedar Rapids*, 354.
9. —: **NOTICE BEFORE EXECUTION OF.** Under section 898 of the Code the notice required by sections 894 and 895 to be given the owner and occupant of land sold for taxes, before the execution of a tax deed therefor, is not necessary in cases where sales were made before the enactment of these provisions. *Id.*
10. **SALE: REDEMPTION: STATUTE OF LIMITATIONS.** An action by the heir of a minor to redeem from tax sale must be commenced within one year after the death of the minor. *Gibbs v. Sawyer*, 443.
11. —: **RECOVERY OF AMOUNT PAID: PRACTICE.** Where, in an action by a tax purchaser to quiet his title, he alleged in his petition that he had paid the taxes for certain years, but did not allege the amount so paid or ask judgment therefor, and it was held in the Supreme Court on appeal that the tax purchaser had the right to recover the taxes, penalties, and interest, the defendant was entitled upon a reversal of the case to file proper pleadings and introduce competent evidence contesting the right of the plaintiff to recover the amount paid by him for taxes. *Miller v. Corbin et al.*, 525.

See HOMESTEAD, 8.

#### TENANT IN COMMON.

1. **RENTS AND PROFITS: HEIR AT LAW.** Facts considered under which it was held that plaintiffs were entitled to recover rents and profits from the defendant for the use and enjoyment of certain realty, which he held in common with plaintiffs' ancestor. *Waters et al. v. Waters*, 555.

#### TENDER.

1. **JUDICIAL SALE.** Where a party paid to the clerk a certain amount as a tender to be accepted, if at all, in full discharge of a judgment, with interest and costs, the acceptance of it by the attorney of the judg-



ment creditor will bind the latter to account to the plaintiff for the proceeds of the sheriff's sale made to satisfy the judgment. *Cotter v. O'Connell*, 552.

### TRIAL

See EVIDENCE, 2, 4.

PRACTICE IN THE SUPREME COURT, 2, 3, 4, 9, 12.

### TRUST.

1. **ESTABLISHMENT OF.** An envelope was indorsed as containing a "deed from Thomas Morris, which is only in trust, and I am to deed back to him any time he desires." A deed between the same parties was introduced in evidence; the fact of a trust having been established, *held*, that in the absence of evidence to the contrary, the deed would be presumed to be the same as that intended by the indorsement. *Morris v. Landaur & Co.*, 234.

### USURY.

1. **SURETYSHIP.** If a surety has given his own note in part payment of his principal's usurious debt, he cannot maintain the plea of usury against the holder of the note so given. *Culver v. Wilbern Bros.*, 26.
2. **BUILDING ASSOCIATIONS: INTEREST UPON PREMIUMS.** Building associations are not authorized by section 1186 of the Code to receive a greater sum per annum for interest upon their loans than ten per cent of the amount actually loaned. Where a note, bearing interest, was executed by a borrower to such an association, including not only the amount actually received by him but also the premium paid for the loan, *held*, that it was usurious. *Hawkeye Benefit and Loan Association v. Blackburn et al.*, 385.

### VENDOR AND VENDEE

1. **FRAUDULENT REPRESENTATIONS.** Where the plaintiff sold land, representing that it contained a large and valuable mineral deposit, *held* that, in the absence of a showing that there was no mineral in the land, as represented, a mere exaggeration as to the amount of the deposit would not constitute such a fraud upon the purchaser as to avoid a note given for the purchase money. *Dawson v. Graham*, 378.
2. ———. In consideration of a note executed by defendant, the plaintiff agreed to convey certain land to a company of which defendant was a member: *Held*, that any fraudulent representation made by plaintiff as to the value of the property could only be taken advantage of by the company, and would not constitute a defense to an action against defendant on the note. *Id.*
3. **CONTRACT TO CONVEY: WAIVER OF FORFEITURE.** Defendant entered into a contract to convey certain real estate, upon payment of the purchase price, as therein provided, the contract also providing that it might be declared forfeited by the defendant, in case any of the payments were not made at the time specified. Defendant afterward stated to the holder of the contract that he would not insist upon the forfeiture in case of default, and upon the strength of such

statement the payments were allowed to become in arrears, and valuable improvements were made upon the property: *Held*, that the statement constituted a waiver of the right of defendant to declare a forfeiture, and that the holder was entitled to specific performance of the contract upon the payment of the purchase money. *Blair et al. v. Blair et al.*, 393.

## VENUE.

1. **CHANGE OF.** After one change of venue the party applying for another change must allege and show that the cause upon which he bases his application was not in existence when the first change was obtained. *Schaentgen v. Smith*, 359.
2. ———: **CRIMINAL LAW.** While the determination of an application for a change of venue, based on local prejudice, is vested in the discretion of the court, yet it is not an absolute and arbitrary discretion, but a sound judicial discretion, subject to review in the appellate court. *The State v. Canada*, 448.

See PRACTICE, 6.

## VERDICT.

1. **GENERAL AND SPECIAL.** When the jury returned a general verdict for one hundred dollars and a special verdict for two hundred dollars, the court was justified in rendering judgment for three hundred dollars. *Ward v. Thompson*, 588.
2. **AFFIDAVITS OF JURORS.** Affidavits are not admissible to show the understanding of jurors. *Id.*

See CRIMINAL LAW, 8.

PRACTICE, 21, 22.

## VERIFICATION.

1. **ATTORNEY.** In an action aided by attachment the affidavit of the attorney to the effect that the facts set out in the petition are better known to him than to the plaintiff, and that he knows them to be true, constitutes a sufficient verification. *Rausch v. Moore*, 611.

## WILL.

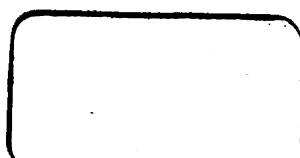
1. **RENUNCIATION OF RIGHTS.** Under the Revision if the widow did not object to the will of her husband, and relinquish all rights conferred thereby, she was deemed to have accepted under it; nor would her own will, published some years afterward, be considered a declaration of her intention to renounce her rights under the will of her husband. *Kyne et al v. Kyne et al.*, 21.
2. **CONSTRUCTION OF.** Where a will provided that two daughters, among several children, should receive the proceeds of certain life insurance, and that if this did not make their shares equal to those of the other children the deficiency should be made up from the balance of the estate, *held*, that they were not entitled to the life insurance, and in addition, to as much as each of the other children. *Id.*

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